



ATTORNEYS FOR APPELLANTS

Kim E. Ferraro
Samuel J. Henderson
Gary, Indiana

**ATTORNEYS FOR AMICUS CURIAE
HENDRICKS COUNTY**

Gregory E. Steuerwald
Graham T. Youngs
Danville, Indiana

**ATTORNEY FOR AMICUS CURIAE
THE INDIANA BANKERS ASSOCIATION**

Martha R. Lehman
Indianapolis, Indiana

**ATTORNEYS FOR AMICUS CURIAE
INDIANA AGRICULTURAL LAW
FOUNDATION, INC.**

Todd J. Janzen
Brianna J. Schroeder
Indianapolis, Indiana

**ATTORNEYS FOR AMICUS CURIAE
INDIANA PORK PRODUCERS
ASSOCIATION, INC.**

Daniel P. McInerney
Andrew M. McNeil
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Christopher J. Braun
Jonathan P. Emenhiser
Justin A. Allen
Indianapolis, Indiana

Kyle A. Lansberry
Brandon W. Ehrie
Indianapolis, Indiana

**ATTORNEYS FOR APPELLEES-
INTERVENOR STATE OF INDIANA**

Curtis T. Hill, Jr.
Attorney General of Indiana

Aaron T. Craft
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Janet L. Himself, Martin Richard
Himself, Robert J. Lannon, Susan
M. Lannon,

Appellants-Plaintiffs,

v.

Samuel Himself, Cory M.
Himself, Clinton S. Himself, 4/9
Livestock, LLC and Co-Alliance,
LLP,

Appellees-Defendants,

and

State of Indiana,

Appellee-Intervenor.

April 22, 2019

Court of Appeals Case No.
18A-PL-645

Appeal from the Hendricks
Superior Court

The Honorable Mark A. Smith,
Judge

Trial Court Cause No.
32D04-1510-PL-150

Altice, Judge.

Case Summary

- [1] Martin Richard Himself, Janet L. Himself, Robert J. Lannon, and Susan M. Lannon (collectively, the Plaintiffs) filed a complaint, alleging nuisance, negligence, and trespass, against Samuel T. Himself, Cory M. Himself, Clinton S. Himself, 4/9 Livestock, LLC, and Co-Alliance, LLP (collectively, the

Defendants). Specifically, the Plaintiffs alleged in their complaint that the concentrated animal feeding operation (CAFO) placed on 4/9 Livestock's property in 2013 created noxious odors that are so extreme as to greatly diminish the Plaintiffs' quality of life, reduce their property values, and alter their daily activities. In their complaint, the Plaintiffs also challenged the constitutionality of Ind. Code § 32-30-6-9, which is commonly known as the Right to Farm Act (the RTFA), and Ind. Code § 15-11-2-6(a),¹ which requires the Indiana Code to be construed to "protect the rights of farmers to choose among all generally accepted farming and livestock production practices, including the use of ever changing technology."

- [2] The Defendants moved for summary judgment on all claims, and, thereafter, the Plaintiffs filed a motion for partial summary judgment regarding their constitutional challenges. Following a hearing, the trial court granted summary judgment in favor of Clinton, Cory, and Samuel Himself (the Individual Himself Defendants) but otherwise denied both motions for summary judgment. The Defendants filed a motion to correct error, once again seeking summary judgment on all claims against them. Amici curiae – the Indiana Agricultural Law Foundation (IALF) and Hendricks County – filed briefs in support of the Defendants' motion to correct error. In addition to opposing the Defendants'

¹ We will refer to this statute as the Agricultural Canon.

motion to correct error, the Plaintiffs asserted cross-error regarding the trial court's grant of summary judgment to the Individual Himself Defendants.

[3] The trial court granted the Defendants' motion to correct error and then entered summary judgment in favor of the Defendants on all claims. On appeal, the Plaintiffs challenge the entry of summary judgment.

[4] We affirm.

Facts & Procedural History

[5] Samuel Himself has farmed in rural Hendricks County his entire life. His sons, Cory and Clinton, also make their living farming in the county. In 2012, the three decided to start a hog-raising operation, and, in January 2013, they formed 4/9 Livestock. The Individual Himself Defendants are the sole members of 4/9 Livestock. The Individual Himself Defendants decided to locate the 4/9 Livestock operation at 3042 North 425 West in Danville (the Farm), which property had been in their family for more than two decades. Samuel's parents acquired this farmland in the early 1990s, and the land had been used for agricultural purposes since at least 1941. Between at least 1994 and 2013, the Farm had been used consistently for crops.

[6] In February 2013, Samuel submitted a rezoning petition to the Hendricks County Area Plan Commission to rezone 58.42 acres of farmland on the Farm. The land was zoned agricultural residential (AGR), and Samuel petitioned for it to be rezoned agricultural intense (AGI), which allows for CAFOs. Following

a public hearing on March 12, 2013, at which Richard Himself spoke in opposition to the rezoning, the Plan Commission unanimously recommended approval of the requested rezoning. In doing so, the Plan Commission made the following written findings:

- (1) **The comprehensive plan[:]** The Commission finds that the proposal does substantially comply with the recommendations of the Hendricks County Comprehensive Plan.... The Comprehensive Plan expressly lists confined animal feeding operations as a recommended land use in the area under consideration.
- (2) **Current conditions and the character of current structures and uses in each district[:]** The Commission finds that the proposal is consistent and compatible with the character of current structures and uses in the zoning district.... The area is a well-established, longstanding agricultural community. Furthermore, the proposed use is an agricultural use expressly recognized in the current Comprehensive Plan.
- (3) **The most desirable use for which the land in each district is adapted[:]** The Commission finds that the proposal does represent the most desirable use for which the land is adapted. The 1983, 1998, and 2008 Comprehensive Plans have consistently recommended that the area be for agricultural use. This represents a longstanding community desire to see this area remain agricultural in character. The proposed use is expressly listed in the current Comprehensive Plan as a characteristic and desirable use in this area.
- (4) **The conservation of property values throughout the jurisdiction[:]** The Commission finds that the proposal does conserve property values....

(5) **Responsible development and growth[:]** The Commission finds that the proposal does represent responsible development and growth. The area under consideration is an integral part of the historically rural agricultural west side of Hendricks County. The last three Comprehensive Plans have recognized this part of the County as being characteristically agricultural and have reserved the area for agricultural uses in the future. This reflects the County's longstanding desire to, in general, plan for urbanization of its east side while maintaining the rural character of its agricultural west side. The proposal under consideration is consistent and compatible with the County's long term land use planning goals.

Appellants' Appendix Vol. IV at 107-08.

[7] On March 26, 2013, the County Commissioners unanimously approved the rezoning and adopted the Plan Commission's findings. After the property was rezoned, it was transferred from Samuel to 4/9 Livestock. The Plaintiffs did not appeal the rezoning decision. Thereafter, before improvement location permits were granted, the Plan Commission held two public hearings regarding the siting, design, and construction plans for the Farm's CAFO, which included the construction of two 4000-hog production buildings. Additionally, in May 2013, the Indiana Department of Environmental Management (IDEM) approved two permits to construct and operate the CAFO buildings on the Farm. The Plaintiffs did not appeal IDEM's permit approvals.

[8] On July 1, 2013, 4/9 Livestock entered into a hog finishing contract with Co-Alliance. Under the contract, Co-Alliance would supply the hogs and 4/9 Livestock would raise them. 4/9 Livestock was to operate as an independent

contractor. Once fully grown, which was within about six months, the hogs would be shipped out of the CAFO by Co-Alliance and a new batch of young hogs would come into the CAFO. On July 19, 2013, 4/9 Livestock and PNC Bank entered into a convertible line of credit note for a seven-figure amount to finance the construction of the CAFO. Shortly after construction was completed, the CAFO buildings were populated with hogs on October 2, 2013. Since the CAFO began operating there have been no violations cited by either IDEM or Hendricks County relating to its operation.

[9] The Plaintiffs live in the immediate vicinity of the Farm. Richard and Janet Himsel (collectively, the Himsel Plaintiffs) moved into their home in 1994. Their home is on a farm where the Himsel Plaintiffs raised livestock and grew crops until 2000, when they retired and sold much of their farmland. Richard grew up on this farm, and the farmhouse has stood since 1926. Robert Lannon built his home in 1971 and married his wife Susan in 1974. They have never farmed on their property but are accustomed to the usual smells that come with living in farm country, having lived there for over forty years.

[10] The Farm and the Plaintiffs' properties are located in western Hendricks County in an area that the county's Board of Commissioners has expressly designated for agricultural purposes since the adoption of the county's first

comprehensive plan in 1983.² The nearest town is over five miles away, and the nearest residential subdivision is about two miles away.

[11] Agricultural uses have dominated in the area surrounding the Farm and the Plaintiffs' properties. In addition to row crops, those uses have included raising livestock such as cattle, hogs, chicken, goats, and sheep. In fact, Richard Himself and his father raised livestock, including 200 head of hogs and 200 head of cattle at a time, in the area directly adjacent to their home for years. For about two years, Richard had a confinement building on his property, approximately 700 feet from his home, that held up to 400 head of hogs. This building was destroyed by fire and not rebuilt. Another farmer, John Hardin, has a hog confined feeding operation located near the Plaintiffs' properties. Hardin has been operating his hog farm for many years and periodically applies hog manure to fields as close as twenty feet from the Himself Plaintiffs' home.

[12] On October 6, 2015, the Plaintiffs filed the instant action raising claims of nuisance, negligence, and trespass against the Defendants and seeking a declaratory judgment that the Agricultural Canon is facially unconstitutional. The Defendants' answer raised the RTFA as an affirmative defense. The State of Indiana intervened to defend the constitutionality of the challenged statute.

² Similar plans were adopted in 1998 and 2008. Notably, the AGI zoning district was not created until the 2008 comprehensive plan. The AGI district "serves to provide adequate and appropriate locations for intense agricultural uses such as CAFO's [sic] or agricultural businesses that may emit intense odors, vibrations, air pollution, or other disruptions." *Appellants' Appendix Vol. VIII* at 22.

Thereafter, the Plaintiffs amended their complaint to add as-applied constitutional challenges to application of the RTFA as a defense in this case.

[13] The Defendants moved for summary judgment with respect to all claims in November 2016, and the Plaintiffs then filed a motion for summary judgment on the constitutionality of the RTFA and the Agricultural Canon. The motions were extensively briefed and supported by a significant amount of designated evidence. On September 27, 2017, the trial court held a summary judgment hearing regarding both motions.

[14] On October 24, 2017, the trial court entered a summary judgment order with extensive findings and conclusions. The court granted summary judgment in favor of the Individual Himself Defendants but otherwise denied the summary judgment motions. Thereafter, on November 22, 2017, the Defendants filed a motion to correct error. Briefs in support of the motion were filed by putative amici IALF and Hendricks County. The trial court granted the amici's motions for leave to appear. Thereafter, on December 21, 2017, the Plaintiffs filed their response to the motion to correct error and asserted cross-error regarding the grant of summary judgment to the Individual Himself Defendants.

[15] The trial court held a hearing on the motion to correct error on January 24, 2018. Four days later, the trial court issued an order granting the motion to correct error, amending its prior conclusions, and granting summary judgment

in favor of the Defendants on all claims. The Plaintiffs now appeal.³

Additional information will be provided below as needed.

Standard of Review

[16] Summary judgment orders are reviewed de novo on appeal, and we apply the same standard of review as the trial court. *Knighten v. E. Chicago Hous. Auth.*, 45 N.E.3d 788, 791 (Ind. 2015). The moving party must show there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Id.* In deciding whether summary judgment is proper, we consider only the designated evidence and construe all factual inferences in favor of the non-moving party. *Id.*

Discussion & Decision

Application of the RTFA

[17] The Plaintiffs' complaint alleges that their use and enjoyment of their homes, as well as their homes' values, were ruined by noxious odors and airborne emissions coming from the CAFO. The RTFA, however, limits the circumstances under which agricultural operations⁴ may be subject to nuisance claims. *See* I.C. § 32-30-6-9(d). The Defendants argue that the RTFA bars

³ Several amici curiae briefs have been filed in support of the Defendants and the State as intervenor. Amici include the IALF, Indiana Pork Producers Association, Inc., Hendricks County, and the Indiana Bankers Association.

⁴ I.C. § 32-30-6-1 defines "agricultural operation" to include "any facility used for the production of crops, livestock, poultry, livestock products, poultry products, or horticultural products or for growing timber."

Plaintiffs' nuisance claim, as well as their other related claims. The material facts in this case are not in dispute. Rather, the disagreement centers on the legal effect of the facts and interpretation of subsection (d)(2) of the RTFA.

[18] The RTFA, I.C. § 32-30-6-9, provides in relevant part:

(a) This section does not apply if a nuisance results from the negligent operation of an agricultural ... operation....

(b) The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

(d) An agricultural or industrial operation ... is not and does not become a nuisance ... by any changed conditions in the vicinity of the locality after the agricultural ... operation ... has been in operation continuously on the locality for more than one (1) year if the following conditions exist:

(1) There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include the following:

(A) The conversion from one type of agricultural operation to another type of agricultural operation.

(B) A change in the ownership or size of the agricultural operation.

....

(D) Adoption of new technology by the agricultural operation.

(2) The operation would not have been a nuisance at the time the agricultural ... operation began on that locality.

The Plaintiffs concede that the agricultural operation here has been in operation continuously for more than one year. Indeed, the record establishes that the farmland in question has been actively farmed for decades. The Plaintiffs also acknowledge that no significant change has occurred in the type of the agricultural operation at the Farm, as strictly defined under subsection (d)(1) of the RTFA.⁵ See *Parker v. Obert's Legacy Dairy, LLC*, 988 N.E.2d 319, 324 (Ind. Ct. App. 2013) (holding that cropland-to-CAFO conversion is not a significant change under the RTFA).

[19] The Plaintiffs contend that the RTFA is not a bar to their nuisance action, however, because the CAFO would have been a nuisance when farming originally began on the Farm. In other words, the Plaintiffs rely upon subsection (d)(2) of the RTFA, which requires that “[t]he operation would not have been a nuisance at the time the agricultural ... operation began on that locality.”

⁵ Prior to an amendment to its current form in 2005, the RTFA required no significant change in the hours and type of operation. In addition to removing the no-significant-change-in-hours condition, the amendment set out a list of changes that *do not* amount to a significant change in the type of operation, including a change in the type of agricultural operation (*i.e.*, changing from crops to livestock), a change of ownership or size of the operation, and the adoption of new technology. In light of the amendment, it is difficult to imagine what would constitute a significant change in the type of operation.

- [20] Contrary to the Plaintiffs' suggestion on appeal, we need not determine precisely when farming originally began on the Farm. The designated evidence establishes that the land had been used for row crops since at least 1941.⁶ Further, the record clearly establishes that the Plaintiffs' non-farming use of their properties began well after 1941. The Lannons built their non-farming residence in 1971, and the Himself Plaintiffs began using their home as a non-farming residence in 2000 after deciding to retire and sell most of their acreage.
- [21] "The [RTFA], by its plain terms, was intended to prohibit nonagricultural land uses from being the basis of a nuisance suit against an established agricultural operation." *TDM Farms, Inc. of North Carolina v. Wilhoite Family Farm, LLC*, 969 N.E.2d 97, 111 (Ind. Ct. App. 2012). It is essentially a codification of the doctrine of coming to the nuisance. *Id.* at 110; *see also Shatto v. McNulty*, 509 N.E.2d 897, 900 (Ind. Ct. App. 1987) ("People may not move to an established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany agricultural pursuits.").⁷

⁶ During his deposition, Richard Himself testified that the Farm had been used for farming his entire life and that prior to the CAFO the land had been used for "rotating crops, corn, soybeans, wheat, oats, probably had a year or two of hay in it when old Bill Wilder had it." *Appellants' Appendix Vol. III* at 191.

⁷ Applying the original version of the RTFA from 1981 (Ind. Code § 34-1-52-4), this court observed: "[P]ork production generates odors which cannot be prevented, and so long as the human race consumes pork, someone must tolerate the smell. [The RTFA] addresses that fundamental fact and protects pork production when it is confined to its natural habitat, that is, rural farm communities such as Jennings County." *Shatto*, 509 N.E.2d at 900.

[22] This is not a case where the Plaintiffs moved to the nuisance as that expression is typically understood. Indeed, the Farm did not change from crop farming to pig farming until well after the Lannons built their home and the Himself Plaintiffs moved into theirs. Prior to the 2005 amendment to the RTFA, this would have constituted a significant change in the agricultural operation making the RTFA inapplicable. *See Wendt v. Kerkhof*, 594 N.E.2d 795, 798 (Ind. Ct. App. 1992) (farm changed from decades of grain farming to hog farming five years after plaintiffs became adjacent landowners), *trans. denied*. As noted above, however, the Plaintiffs acknowledge that in light of the 2005 amendment, the change in the agricultural operation here from crops to hogs did not constitute a significant change in the type of operation. *See Parker*, 988 N.E.2d at 324 (“By specifying that a conversion from one agricultural operation to another is not a significant change, the Act removes claims against existing farm operations that later undergo a transition from one type of agriculture to another.”). Thus, the coming to the nuisance doctrine, as applied by the RTFA, now encompasses coming to the potential future nuisance.

[23] Agricultural uses have dominated the landscape surrounding the Plaintiffs’ properties, with a number of farmers in the area owning or having owned livestock. Richard Himself, prior to retiring from farming, even had livestock on his property. The county’s Plan Commission and County Commissioners recognized the well-established, longstanding agricultural community in which the Farm was situated and indicated the county’s ongoing desire to maintain the rural character of Hendricks County’s agricultural west side. Further, the

Comprehensive Plan for the area in question expressly lists CAFOs as a recommended land use.

[24] Robert Lannon knowingly built his residential home in the middle of farm country, and the Himsel Plaintiffs lived and farmed on their property for a number of years before selling off much of their land and changing the use of their home to purely residential. None of the Plaintiffs can now be heard to complain that their residential use of their property is being negatively impacted because the use of the Farm changed from crops to hogs, a use that would not have been a nuisance in or around 1941 when the agricultural operation began on the locality.

[25] The Plaintiffs contend that applying the RTFA in this manner will “have the extraordinary effect of removing *any* evidentiary burden by allowing CAFOs of *any size* to be built anywhere there is *any history* of agricultural activity.” *Appellants’ Brief* at 27 (emphases in original). We are not so sure. Moreover, we observe that requiring a defendant farmer to establish that his or her particular CAFO (rather than hog farming or CAFOs generally) would not have been a nuisance when the agricultural operation began on the locality would eviscerate the protections of the RTFA.

[26] The Plaintiffs’ argument also ignores the significant local and administrative hurdles a farmer must overcome before being allowed to build a CAFO. In this case, after a number of public hearings and notices to adjoining landowners, the Defendants obtained rezoning of the Farm and building permits from the

county approving the specific siting, design, and construction plans for the CAFO's two buildings. The Plaintiffs did not seek judicial review of these decisions by county officials. The Defendants also applied for permits from IDEM for the construction and operation of the CAFO. The Plaintiffs did not appeal issuance of these permits. The Plaintiffs were provided ample due process to challenge the size and/or placement of the CAFO buildings on the Farm, yet they decided instead to wait and file a nuisance action more than two years later. In light of the RTFA, they put their eggs in the wrong basket. Their general nuisance claim fails as a matter of law.

[27] The RTFA provides an exception where an alleged nuisance results from the negligent operation of the agricultural operation or its appurtenances. *See* I.C. § 32-30-6-9(a). The designated evidence provides no indication that the CAFO has been negligently operated by 4/9 Livestock or has violated IDEM regulations. *See Lindsey v. DeGroot*, 898 N.E.2d 1251, 1260-62 (Ind. Ct. App. 2009) (addressing alleged operational negligence based on violations of IDEM regulations and concluding, on summary judgment, that the violations were not the proximate cause of the alleged injury); *see also Dalzell v. Country View Family Farms, LLC*, 517 F. App'x 518, 520 (7th Cir. 2013) ("Unless the nuisance 'results from' the negligence, and not just from the agricultural operation, the Act applies and defeats plaintiffs' claim."). Further, we agree with the Defendants and amici that the Plaintiffs' claim of negligent siting (*i.e.*, the

decision to build and operate a CAFO at a particular location)⁸ cannot constitute negligent operation under the RTFA. If allowed, it would simply create an end run around the protections of the RTFA.

- [28] The Plaintiffs also brought a trespass claim purportedly based on “the unlawful physical intrusion of the CAFO’s noxious emissions into their properties and homes.” *Appellants’ Brief* at 39. They allege that the emissions – “animal waste, air pollutants, harmful gases, and noxious odors” – are chemical compounds that result in a physical, space-filling invasion into their homes. *Appellants’ Appendix Vol. III* at 10. Despite artful pleading, we observe that application of the RTFA does not turn on labels. The trial court properly concluded that the Plaintiffs’ trespass claim is barred by the RTFA. *See Ehler v. LVDVD, L.C.*, 319 S.W.3d 817, 824 (Tex. Ct. App. 2010) (“Permitting the [plaintiffs] to avoid the application of [the Texas RTFA] by pleading a nuisance action as a trespass would eviscerate the statute and deny [the defendants] the protection intended by the Legislature when it passed the Right to Farm Act.”).

Constitutional Claims

- [29] The Plaintiffs contend that the RTFA is unconstitutional as applied to them because it violates the Open Courts Clause, the Takings Clause, and the Equal

⁸ The Plaintiffs assert that “the CAFO Operators negligently sited, designed and built their 8,000-hog CAFO in an inappropriate location” and have continued to operate the CAFO “despite the now unmistakable effect on their neighbors”. *Appellants’ Brief* at 34. They claim that the Defendants had a duty to take reasonable care to “keep emissions of their CAFO from injuring their neighbors.” *Id.* at 35. We reject the Plaintiffs’ attempt to repackage their nuisance claim to avoid the effects of the RTFA.

Privileges and Immunities Clause of the Indiana Constitution, as well as the federal Takings Clause. In sum, they assert that application of the RTFA has deprived them of their ability to enforce their long-vested property rights in their homes. The Plaintiffs also assert a facial challenge to the Agricultural Canon.

- [30] We review the constitutionality of a statute de novo. *See Tyson v. State*, 51 N.E.3d 88, 90 (Ind. 2016). Statutes come before us “clothed with the presumption of constitutionality until clearly overcome by a contrary showing.” *Zoeller v. Sweeney*, 19 N.E.3d 749, 751 (Ind. 2014). “The party challenging the constitutionality of a statute bears the burden of proof, and all doubts are resolved against that party and in favor of the legislature.” *Id.*

Open Courts Clause

- [31] The Plaintiffs first contend that the RTFA violates the Open Courts Clause, Article 1, Section 12 of the Indiana Constitution, which provides in relevant part: “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.” Our Supreme Court has made clear that this clause “does not prohibit all conditions on access to the courts, but it does prevent the legislature from arbitrarily or unreasonably denying access to the courts.” *KS&E Sports v. Runnels*, 72 N.E.3d 892, 905 (Ind. 2017).

The right of access presupposes an underlying cause of action to which the right of access attaches and for which the law affords a remedy. The legislature has wide latitude in defining the existence and scope of a cause of action and in prescribing the

available remedy. In *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000), we reaffirmed the legislature’s longstanding prerogative “to modify or abrogate the common law.” *Id.* at 977 (citations omitted). An important corollary is that “[i]f the law provides no remedy, [Article 1,] Section 12 does not require that there be one.” *Id.* at 979.

Id. at 906.

[32] The Plaintiffs assert that they have a vested right to use and enjoy their property and that the RTFA has been unconstitutionally applied to deny their access to the courts to enforce that right. This argument misses the mark. The Open Courts Clause does not require the substantive law to provide a remedy, and individuals have no vested or property right in any rule of common law.⁹

McIntosh, 729 N.E.2d at 978. Accordingly, “the General Assembly can make substantial changes to the existing law without infringing on citizen rights.” *Id.*

[33] Here, the legislature has exercised its broad discretion and modified the substantive law of nuisance by eliminating a nuisance cause of action against agricultural operations except where the alleged nuisance is the result of negligent operation or where the conditions of I.C. § 32-30-6-9(d) are not met.

⁹ The Plaintiffs curiously direct us to *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), to support their claim that they have a vested right to pursue a nuisance claim to protect their properties. *Martin*, however, is inapposite. In that case, the Supreme Court observed, “it cannot be questioned that, had plaintiff filed her medical malpractice claim within the two-year period, she could have pursued her otherwise valid tort claim.” *Id.* at 1283. In this case, however, the Plaintiffs never had a valid tort claim because the facts underlying their nuisance claim occurred well after the RTFA went into effect and barred such a claim.

The RTFA is rational and falls comfortably within the legislature's legitimate constitutional authority.

Takings Clauses

[34] Article 1, Section 21 of the Indiana Constitution provides in part: “No person’s property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.” The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, includes the same proscription against the taking of property without just compensation. *Lindsey*, 898 N.E.2d at 1257-58. We construe and analyze the “textually indistinguishable” takings clauses identically. *See Redington v. State*, 992 N.E.2d 823, 835 (Ind. Ct. App. 2013), *trans. denied*; *see also State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 211-12 (Ind. 2009) (“our state constitutional takings analysis is the same as federal constitutional eminent domain law”), *cert. denied*.

[35] “To be a taking in the constitutional sense, the state action at issue must be more than a consequential limitation on the use or enjoyment of property; a taking involves an actual interference with a property right.” *Lindsey*, 898 N.E.2d at 1258 (rejecting plaintiffs’ argument that the RTFA amounts to an unconstitutional taking because the act essentially awarded the defendant a nuisance easement over their property). In this case, the Plaintiffs assert a regulatory takings claim, as they acknowledge that there has been no direct

seizure of their property.¹⁰ Regulation, however, effects a taking only where it “deprives an owner of all or substantially all economic or productive use of his or her property.” *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 577 (Ind. 2007) (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005)); *see also Lingle*, 544 U.S. at 539 (“our regulatory takings jurisprudence...aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain”). “Factors considered under the foregoing test include the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action.” *Kimco*, 902 N.E.2d at 211 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

[36] The State, as intervenor, asserts that a constitutional taking occurs only where the government, as opposed to a private party, directly or proximately causes the interference with the claimant’s property. The State argues further that the Plaintiffs have no property interest in a particular cause of action or remedy. We find the State’s argument compelling, but we need not make a determination in this regard because, even considering the regulatory takings factors, the Plaintiffs lose.

¹⁰ The Plaintiffs’ reliance on *Arkansas Game & Fish Comm’n v. U.S.*, 568 U.S. 23 (2012), and other similar flooding cases, is misguided and improperly conflates physical takings with regulatory takings. *See id.* (addressing recurrent government-induced flooding invasions and holding that such temporary physical occupations can constitute a compensable taking of property).

[37] In *Biddle*, homeowners near the Indianapolis International Airport (owned by a municipal corporation) claimed that airplanes flying over their homes constituted a regulatory taking because the noise disturbed the use and enjoyment of their properties “by disrupting activities such as sleeping, talking, watching television or listening to the radio, hosting outdoor parties, reading, and opening windows.” 860 N.E.2d at 573. Additionally, the homeowners claimed that their property values had decreased up to thirty-three percent. Our Supreme Court affirmed the grant of summary judgment in favor of the airport. In concluding as a matter of law that the aircraft noise had not effected a taking, the Court acknowledged that the noise was “no doubt considerable” but found that it did not “amount to a ‘practical destruction’ or ‘substantial impairment’ of Homeowners’ use of their property.” *Id.* at 580. The Court continued, “Homeowners still make many valuable uses of their properties in spite of the noise.” *Id.*

[38] Similarly, here, the Plaintiffs have not been deprived of all or substantially all economic or productive use of their properties. The designated evidence reveals that the Plaintiffs’ properties have retained significant economic value. Indeed, their own expert valued the Lannons’ property at \$51,500 (at an estimated 60% loss in value) and the Himsel Plaintiffs’ property at \$181,2000 (at an estimated 49.5% loss in value) with the CAFO nearby. *Cf. Penn. Cent.*, 438 U.S. at 131 (with respect to land-use regulations, reasonably related to the promotion of the general welfare, diminution in property value, standing alone, does not establish a taking); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75%

diminution in value caused by zoning law not found to be a taking). Moreover, they continue to reside in their residences, making valuable use of their properties, and have alleged no distinct, investment-backed expectations that have been frustrated by the CAFO. Finally, with respect to the character of the governmental action, we do not agree with the Plaintiffs that the RTFA has permitted a physical invasion of their property. While their property rights are clearly affected by application of the RTFA, the Plaintiffs cannot dispute that the regulation is reasonably related to the promotion of the common good. In sum, we conclude that the odorous emissions from 4/9 Livestock's CAFO do not effect a taking.

Privileges and Immunities Clause

[39] Article 1, Section 23 of the Indiana Constitution provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Our Supreme Court has set out a two-part standard for determining a statute's validity where the statute grants unequal privileges or immunities to differing classes of persons.

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994); *see also Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 198 (Ind. 2016). Presuming the statute to be constitutional, we place the burden on the challenger to “negative every conceivable basis which might have supported the classification.” *Collins*, 644 N.E.2d at 80. Classification under Section 23 is primarily a legislative question, and it becomes a judicial question only where the lines drawn by the legislature appear arbitrary or manifestly unreasonable. *Id.*

[40] The Plaintiffs assert that the RTFA splits county dwellers into two camps: (1) those currently engaged in agricultural operations on land that has been consistently farmed for at least the last year and (2) all others who live in the county. Those in the first group may sue those in either group for nuisance, while those in the second group may only sue those in their own non-farming group for nuisance.

[41] Indeed, the RTFA affords preferential treatment to farmers, under certain statutory conditions, by conferring immunity from nuisance suits that are not based on operational negligence.¹¹ The RTFA, itself, explains the policy behind this disparate treatment:

The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food

¹¹ While the Act also applies to protect industrial operations from nuisance suits, it provides broader immunity to agricultural operations. *See* I.C. § 32-30-6-9(d)(1) (providing a list of changes that, for agricultural operations, do not constitute a significant change in the type of operation).

and other agricultural products. The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

I.C. § 32-30-6-9(b). This rationale provides a reasonable basis for treating farmers differently than their non-farming neighbors.¹² *Cf. KS&E Sports*, 72 N.E.3d at 906-07 (“One explanation may be that the legislature ... perceived that recent lawsuits against the firearms industry threatened its stability and jeopardized the continued availability of firearms even to law-abiding citizens wishing to exercise their Second Amendment. This rationale would provide a reasonable basis for treating sellers of firearms, which face such litigation threats, differently than sellers of knives, which do not.”). With respect to the second prong of the *Collins* test, we conclude that the RTFA’s preferential treatment is uniformly and equally available to all agricultural operations and although agricultural operations are treated differently under the RTFA than

¹² The Plaintiffs note prior cases in which we have held that the RTFA does not apply between two farmers. *See TDM Farms*, 969 N.E.2d at 110 (“the Act does not apply in this action between two established farming operations”); *Stickdorn v. Zook*, 957 N.E.2d 1014, 1016 n.5 (Ind. Ct. App. 2011) (the RTFA “has no applicability to the manner in which two farmers...conduct their operations). The Plaintiffs claim that the Himsel Plaintiffs could have brought this action if only they had not retired from farming in 2000 and that this fact makes the disparate treatment arbitrary. This is incorrect. The RTFA still applies where one farmer asserts nonagricultural land uses as the basis of his or her nuisance suit against another farmer. *See Parker*, 988 N.E.2d at 323.

industrial operations, the two are not similarly situated and the express intent of the RTFA is to protect agricultural land. The RTFA does not violate Article 1, Section 23.

Constitutional Challenge to the Agricultural Canon

[42] The Agricultural Canon, enacted in 2014, provides:

The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of agriculture, agricultural businesses, and agricultural land for the production of food, fuel, fiber, and other agricultural products. The Indiana Code shall be construed to protect the rights of farmers to choose among all generally accepted farming and livestock production practices, including the use of ever changing technology.

I.C. § 15-11-2-6(a). The Plaintiffs contend that the Agricultural Canon is unconstitutional for various reasons.

[43] The Agricultural Canon is a rule of statutory construction signaling the legislature's intent to courts called upon to construe ambiguous statutes affecting farmers. In other words, where a statute is clear and unambiguous, the Agricultural Canon will not be applied. *Cf. Crowel v. Marshall Cty. Drainage Bd.*, 971 N.E.2d 638, 646 (Ind. 2012) ("where the statute is clear and unambiguous, we apply it as drafted without resort to the nuanced principles of statutory interpretation"). Further, our primary goal in applying a statute is always to ascertain and give effect to the legislature's intent. *See id.* at 645.

[44] Through the RTFA, the legislature spoke clearly and unambiguously regarding its intent to protect the rights of farmers by limiting the circumstances under which farmers are subject to nuisance actions. This includes protecting agricultural operations that change from one type of agricultural operation to another or that adopt new technology. Given the clear language of the RTFA, this is not a case in which the Agricultural Canon needs to be applied. *See KS&E Sports*, 72 N.E.2d at 898 (“before interpreting a statute, we consider ‘whether the Legislature has spoken clearly and unambiguously on the point in question’”) (quoting *Basileh v. Alghusain*, 912 N.E.2d 814, 821 (Ind. 2009)). Accordingly, we do not address the various constitutional challenges raised by the Plaintiffs regarding the Agricultural Canon. *See Barlow v. Sipes*, 744 N.E.2d 1, 6 n.1 (Ind. Ct. App. 2001) (“Indiana has long adhered to the doctrine of judicial restraint” where “a constitutional question will not be anticipated in advance of the necessity of deciding the constitutional issue”), *trans. denied*.

Conclusion

[45] We hold that the Plaintiffs’ nuisance and repackaged negligence and trespass claims are barred by the RTFA. Further, the Plaintiffs’ various claims that the RTFA is unconstitutional are unavailing, and we do not reach the question of the constitutionality of the Agricultural Canon due to judicial restraint. The trial court properly granted summary judgment in favor of the Defendants on all claims.

[46] Judgment affirmed.

Brown, J. and Tavitas, J., concur.

STATE OF INDIANA) IN THE HENDRICKS SUPERIOR COURT
) SS:
 HENDRICKS COUNTY) CASE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
 HIMSEL, ROBERT J. LANNON and)
 SUSAN M. LANNON,)
)
 Plaintiffs,)
)
 v.)
)
 SAMUEL T. HIMSEL, CORY M.)
 HIMSEL, CLINTON S. HIMSEL,)
 4/9 LIVESTOCK, LLC, and)
 CO-ALLIANCE, LLP,)
)
 Defendants.)

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
 IN PART AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
 AND MOTION TO STRIKE**

I. PROCEDURAL HISTORY

On October 6, 2015, Plaintiffs Martin Richard Himsel, Janet L. Himsel, Robert J. Lannon and Susan M. Lannon (collectively, "Plaintiffs") filed their complaint against Defendants Samuel T. Himsel, Cory M. Himsel, Clinton S. Himsel (collectively the "Individual Defendants"), 4/9 Livestock, LLC ("4/9 Livestock") and Co-Alliance, LLP ("Co-Alliance") (all defendants are collectively referred to as the "Defendants"). On December 18, 2015, the Court issued an order allowing the State of Indiana ("State") to intervene for the limited purpose of defending the constitutionality of Indiana's laws. On November 18, 2016, the Defendants filed a Motion for Summary Judgment requesting that the Court grant summary judgment in favor of all Defendants on all claims ("Defendants' Motion for Summary Judgment"). On December 15, 2016, the Plaintiffs filed a Motion for Summary Judgment requesting that the Court find Indiana's Right to Farm Act ("RTFA") to be unconstitutional ("Plaintiffs' Motion for Summary Judgment"). On

January 20, 2017, Plaintiffs filed their response in opposition to the Defendants' Motion for Summary Judgment. On August 21, 2017, the Defendants filed their Consolidated Reply Brief in Support of Defendants' Motion for Summary Judgment and Response In Opposition to Plaintiffs' Motion for Summary Judgment. On that same date the State filed its response in opposition to the Plaintiffs' Motion for Summary Judgment. On September 11, 2017, the Plaintiffs filed a Reply in Support of Plaintiffs' Motion for Summary Judgment. That same day the Plaintiffs filed a Motion to Strike Improper Argument and Impermissible Evidence ("Plaintiffs' Motion to Strike"). On September 25, 2017, the Defendants' Response In Opposition to Plaintiffs' Motion to Strike ("Defendants' Response") was filed. On September 27, 2017, the Court heard oral argument on the competing motions for summary judgment, the Plaintiffs' Motion to Strike and Defendants' Response. Following the hearing, the Court took these matters under advisement and the parties each submitted proposed orders. The Court now makes the following findings of facts, conclusions of law and order:

II. UNDISPUTED MATERIAL FACTS

1. Plaintiffs Richard and Janet Himsel live at 3581 West 350 North, Hendricks County, Indiana. Their home was built in 1926. They have lived at that location since 1994. Their property consists of a 26-acre farm where they raised livestock and grew crops until approximately 2000 when they retired. Richard grew up on the property which was previously owned and farmed by his parents. Richard raised livestock including cattle and hogs for many years.

2. Plaintiffs Robert and Susan Lannon live at 3868 West 350 North, Hendricks County, Indiana. They have lived at that location since 1971.

3. Robert and Susan Lannon, and Richard and Janet Himsel, are accustomed to the usual smells associated with farm living.

4. Prior to 2013, all four (4) plaintiffs lived alongside agriculture, including livestock, as a result of surrounding farm ground consisting of row crops and livestock farms.

5. The land located at 3042 North 425 West, Danville, Indiana (the “Property”) has been used for agricultural purposes for decades. Since at least 1941 the Property has been used for agricultural purposes, principally for growing crops.

6. In the early 1990’s Defendant Sam Himsel’s parents, Lee and Doris Himsel, acquired the Property. The Himsels continued the agricultural use of the Property by growing crops on the Property.

7. The entire area surrounding the Property has been dominated by agricultural uses, including the raising of livestock, for decades.

8. The agricultural nature of this area has been reflected in the Hendricks County Comprehensive Plans, first adopted in 1983 by Hendricks County and the Board of Commissioners of Hendricks County.

9. Richard Himsel was formerly a member of the Hendricks County Board of Commissioners.

10. The 1983 Comprehensive Plan designated the western half of Marion Township, where the Property is located, for agricultural purposes.

11. In 1998 the Comprehensive Plan was updated again by Hendricks County and the Board of Commissioners of Hendricks County, which continued to designate the western half of Marion Township, including the Property, for agricultural purposes.

12. Hendricks County amended its Comprehensive Plan again in 2008 creating the AGR-Agricultural Residential and AGI-Agricultural Industrial districts. The new AGR district

replaced the previous “Rural Residential” (R-A) district which applied to Plaintiffs’ properties and the Property.

13. The County’s stated intent for establishing the AGR district in 2008 was: “to permit the establishment of individual single-family dwellings while maintaining a primarily rural character [and] . . . protect land best suited for agricultural use from the encroachment of incompatible land uses.”

14. The stated intent for establishing the AGI district was: “to provide adequate and appropriate locations for intense agricultural uses such as CAFO’s or agricultural businesses that may emit intense odors, vibrations, air pollution, or other disruptions.”

15. Consistent with the 1983 and 1998 Comprehensive Plans, the 2008 Comprehensive Plan recommended that the area under consideration, including Marion Township as a whole and the Property in particular, be reserved for agricultural use.

16. In 2012 the Individual Defendants decided to form a hog-raising operation.

17. On January 16, 2013, 4/9 Livestock was formed as an Indiana limited liability company, with each Individual Defendant being a member of 4/9 Livestock.

18. The Individual Defendants made the decision to locate the hog-raising operation (“4/9 Farm”) on the Property.

19. In February 2013, Samuel Himsel, on behalf of 4/9 Livestock, submitted a Petition for Rezoning of Property to the Hendricks County Area Plan Commission (“Plan Commission”).

20. The rezoning petition sought to rezone 58.42 acres of existing farmland at the Property from AGR-Agriculture Residential to AGI-Agriculture Intense to allow for a confined animal feeding operation (“CAFO”) at the Property.

21. On March 1, 2013, written notice of the Plan Commission's March 12, 2013 meeting with a letter of intent was provided to nearby landowners and was published in local newspapers.

22. On March 5, 2013, the Plan Commission staff recommended approval of the Petition for rezoning the Property from AGR to AGI finding, generally, that the proposal "has complied with the applicable application and/or notice requirements" and that it "complies with the Hendricks County Comprehensive Plan."

23. On March 12, 2013, the Plan Commission held a public meeting on the 4/9 Farm rezoning petition. Nearby landowners and the Plaintiffs had an opportunity to speak at the March 12, 2013 meeting. Plaintiff Richard Himsel spoke against the Petition.

24. After considering the Petition and the public comments at the March 12, 2013 meeting, the members of the Plan Commission unanimously recommended approval of the zoning amendment and specifically concluded that the rezoning petition was consistent and compatible with the County's long term land use planning goals.

25. On March 26, 2013, the Board of County Commissioners of Hendricks County ("County Commissioners") unanimously approved Ordinance 2013-03 which amended the Property's zoning designation from AGR to AGI.

26. The Plaintiffs did not appeal the rezoning decisions of the Plan Commission or the County Commissioners.

27. The Plan Commission subsequently held a series of public meetings regarding the CAFO's design, location and construction plans – including the size and location of the barns, setback requirements, manure containment pits and the landscaping – to determine whether they

were appropriate for this location. The Plan Commission approved the siting, design, location and construction plans for the CAFO.

28. The Plaintiffs did not appeal any of the Plan Commission's decisions regarding the CAFO's design, location and construction plans.

29. In April 2013, 4/9 Livestock applied to the Indiana Department of Environmental Management ("IDEM") for two permits to construct and operate a CAFO at the Property.

30. On May 6, 2013, the Property was transferred by quitclaim deed by Samuel Himsel to 4/9 Livestock.

31. On May 31, 2013, IDEM approved 4/9 Livestock's permit applications. IDEM sent its letter of permits approval to the surrounding property owners including the Plaintiffs. The letter described how, where and by when the IDEM permitting decisions could be appealed.

32. The Plaintiffs did not appeal IDEM's decision to issue permits to 4/9 Livestock to construct and operate a CAFO on the Property.

33. On July 1, 2013, 4/9 Livestock and Co-Alliance, LLP ("Co-Alliance") entered into the Hog Finishing Contract (the "Contract").

34. Per the Contract, Co-Alliance owns the hogs and 4/9 Livestock raises the hogs owned by Co-Alliance.

35. Per the Contract, 4/9 Livestock is the owner and operator of the 4/9 Farm and the equipment located at the 4/9 Farm.

36. Per the Contract, Co-Alliance can unilaterally end it at any time at its sole discretion if it determines that 4/9 is providing substandard care or the conditions in which the hogs are kept are substandard.

37. Per the Contract, 4/9 may not raise hogs for anyone else, let anyone into the CAFO or take pictures of the hogs without Co-Alliance's permission.

38. Per the Contract, Co-Alliance retains the right of control over certain practices such as the right to update the management practices that 4/9 must follow.

39. Per the Contract, Co-Alliance established thirteen (13) separate recommended practices which 4/9 must follow.

40. On July 19, 2013, 4/9 Livestock and PNC Bank entered into a Convertible Line of Credit Note for a seven-figure amount to finance the construction of the 4/9 Livestock CAFO.

41. Construction of the CAFO barns at the 4/9 Farm was completed by September 19, 2013.

42. The first hogs were delivered to the 4/9 Farm on October 2, 2013.

43. The 4/9 Farm has been in continual agricultural operation as a CAFO since that time.

44. Since the 4/9 Livestock CAFO began operating there have been no violations cited by either IDEM or Hendricks County relating to its operations.

45. On October 6, 2015 the Plaintiffs filed their Complaint against the Defendants. The Plaintiffs' Complaint asserted claims against the Defendants in Nuisance, Negligence and Trespass.

46. The Plaintiffs further sought a declaratory judgment that Indiana Code §15-11-2-6(a) was unconstitutional on its face.

47. On April 4, 2017, this Court issued an Order that deemed as filed an Amended Complaint, originally submitted by the Plaintiffs on August 8, 2016. In addition to the previously-

asserted causes of action, the Amended Complaint added a count for declaratory judgment that the Indiana RTFA, Indiana Code § 32-30-6-9, was unconstitutional as applied in this case.

III. CONCLUSIONS OF LAW

1. Indiana's Right To Farm statute, I.C. § 32-30-6-9 ("RTFA") states as follows:
 - (a) This section does not apply if a nuisance results from the negligent operation of an agricultural or industrial operation or its appurtenances.
 - (b) The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.
 - (c) For purposes of this section, the continuity of an agricultural or industrial operation shall be considered to have been interrupted when the operation has been discontinued for more than one (1) year.
 - (d) An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if the following conditions exist:
 - (1) There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include the following:
 - (A) The conversion from one type of agricultural operation to another type of agricultural operation.
 - (B) A change in the ownership or size of the agricultural operation.
 - (C) The:
 - (i) enrollment; or
 - (ii) reduction or cessation of participation; of the agricultural operation in a government program.

(D) Adoption of new technology by the agricultural operation.

(2) The operation would not have been a nuisance at the time the agricultural or industrial operation began on that locality.

2. The RTFA protects farmers against nuisance claims if three conditions are met:

(1) The agricultural operation was in operation continuously on the locality for more than one year prior to the plaintiff's lawsuit;

(2) No significant change occurred in the type of agricultural operation on the locality; and

(3) The agricultural operation would not have been a nuisance when it began on the locality.

3. Plaintiffs concede that Defendants' CAFO is an agricultural operation that was operated continuously for more than one (1) year and has undergone no significant change as defined in I.C. §32-30-6-9(d)(1).

4. However, the Plaintiffs assert that the Defendants are not entitled to immunity pursuant to the RTFA because the Defendants have not shown that their CAFO would not have been a nuisance when agricultural operations began at the Property pursuant to I.C. §32-30-6-9(d)(2).

5. Construing the designated in evidence in the light most favorable to the Plaintiffs, the Court finds that there is a genuine issue of material fact whether the CAFO would have been a nuisance when agricultural operations began at the Property. There is no ambiguity in the meaning of "would have been" and the clear legislative intent means that there is a genuine issue of material fact whether the CAFO would have been a nuisance at least as early as 1941, and likely much earlier.

6. The RTFA contains an exception that provides that the RTFA "does not apply if a nuisance results from the negligent operation of an agricultural or industrial operation or its

appurtenances.” IND. CODE § 32-30-6-9(a). Plaintiffs contend that the Defendants are not entitled to immunity pursuant to the RTFA because Defendants have not affirmatively negated Plaintiffs’ claim of negligent operation. Plaintiffs have also asserted a claim against Defendants alleging negligence in the siting, design, construction, maintenance, management, operation, direction and control of the CAFO.

7. Construing the designated evidence in the light most favorable to the Plaintiffs, the Court finds there are genuine issues of material fact precluding the entry of summary judgment on the issue of negligent operation and the separately alleged negligence siting claim.

8. The Plaintiffs challenge the constitutionality of the RTFA claiming that it: (1) violates Article I, Section 1 of the Indiana Constitution; (2) violates Article I, Section 12 of the Indiana Constitution (the “Open Courts provision”); (3) violates the Fifth Amendment of the U.S. Constitution and Article I, Section 21 of the Indiana Constitution (the “Takings Clause(s)”); and (4) violates Article I, Section 23 of the Indiana Constitution (the “Equal Privileges and Immunities provision”).

9. Because there are fact issues precluding the entry of summary judgment, the Court finds the question of the constitutionality of the RTFA as applied unripe at this time.

10. The Plaintiffs also argue that IND. CODE § 15-11-2-6(a) violates the Indiana Constitution. The Court denies the Plaintiffs’ motion for summary judgment that IND. CODE § 15-11-2-6(a) is unconstitutional on its face. There remains a possibility that the issues may be resolved on other grounds and the issue of the constitutionality of this statute is not absolutely necessary to a disposition of the case at this time.

11. The Plaintiffs’ trespass claim is based on their assertion that odors from the 4/9 Farm have entered their properties and, as a result, the value of their properties have been

negatively impacted. The Court finds there are genuine issues of material fact precluding the entry of summary judgment on the Plaintiffs' trespass claim and therefore denies the Defendants' motion on this issue.

12. The Court finds that the Plaintiffs have failed to designate any evidence that any of the Individual Defendants have ignored the corporate form or caused a "fraud or injustice" through any alleged disregard of the corporate form. Moreover, the Plaintiffs have failed to designate any evidence demonstrating a tortious act by the Individual Defendants. The Individual Defendants are entitled to summary judgment as a matter of law.

13. Co-Alliance is not entitled to summary judgment as a matter of law. Plaintiffs have designated sufficient evidence to raise a genuine issue of material fact such that a jury must decide whether Co-Alliance is liable.

IV. ORDER

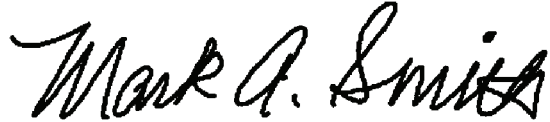
IT IS THEREFORE ORDERED ADJUDGED AND DECREED that

- (1) The Defendants' Motion for Summary Judgment is granted in part;
- (2) Final judgment is entered in favor of the Individual Defendants and against the Plaintiffs as to all issues and claims;
- (3) Defendants' Motion for Summary Judgment is denied as to all other issues and claims;
- (4) The Court reserves judgment on the constitutionality of the RTFA, I.C. §32-30-6-9, as applied;
- (5) The Plaintiffs' Motion for Summary Judgment seeking a declaration that Indiana Code § 15-11-2-6(a) is unconstitutional on its face is denied;
- (6) The Plaintiffs' Motion to Strike is denied; and

- (7) Pursuant to Indiana Trial Rule 54(B) and finding no just cause for delay, the Court directs the clerk to enter final judgment accordingly.

October 24, 2017

Date: _____



Judge, Hendricks Superior Court

Distribution:

Christopher J. Braun
Jonathan P. Emenhiser
Justin A. Allen
PLEWS SHADLEY RACHER & BRAUN LLP
1346 North Delaware Street
Indianapolis, Indiana 46202

Kim E. Ferraro
Samuel Henderson
Hoosier Environmental Council
407 E. Lincolnway, Suite A
Valparaiso, IN 46383

Rebecca Loeffler
Jefferson Garn
Office of Indiana Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770

Kyle A. Lansberry
Brandon W. Ehrie
LEWIS WAGNER LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202-6150

STATE OF INDIANA) IN THE HENDRICKS SUPERIOR COURT
) SS:
HENDRICKS COUNTY) CASE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and)
SUSAN M. LANNON,)

Plaintiffs,)

v.)

SAMUEL T. HIMSEL, CORY M.)
HIMSEL, CLINTON S. HIMSEL,)
4/9 LIVESTOCK, LLC, and)
CO-ALLIANCE, LLP,)

Defendants.)

ORDER GRANTING DEFENDANTS' MOTION TO CORRECT ERRORS AND
GRANTING SUMMARY JUDGMENT

This matter came before the Court on January 24, 2018 for a hearing on cross motions to correct errors. After considering the motions, briefs, cases and arguments of counsel, the Court now corrects its Findings of Fact and Conclusions of Law entered on October 24, 2017 as follows:

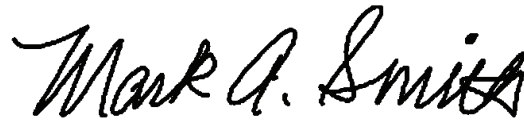
After carefully reviewing and reconsidering the holdings from relevant cases, The Court's Conclusions of Law are hereby corrected as follows:

Construing the designated in evidence in the light most favorable to the Plaintiffs, the Court finds that there are no genuine issues of material fact and Defendants are entitled to summary judgment as a matter of law as to all of the Plaintiffs' claims including negligent siting and negligent operation claims, the "would not have been a nuisance" element of the RTFA claim, the negligence and trespass claims and the liability of Co-Alliance.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that

- (1) The Defendants' Motion for Summary Judgment is granted in total as to all claims and all parties;
- (2) Final judgment is entered in favor of all Defendants and against the Plaintiffs as to all issues and claims;
- (3) Pursuant to Indiana Trial Rule 54(B) and finding no just cause for delay, the Court directs the clerk to enter final judgment accordingly.

Date: **February 9, 2018**



Judge, Hendricks Superior Court

Distribution:

Christopher J. Braun
Jonathan P. Emenhiser
Justin A. Allen
PLEWS SHADLEY RACHER & BRAUN LLP
1346 North Delaware Street
Indianapolis, Indiana 46202

Kim E. Ferraro
Samuel Henderson
Hoosier Environmental Council
407 E. Lincolnway, Suite A
Valparaiso, IN 46383

Rebecca Loeffler
Jefferson Garn
Office of Indiana Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770

Kyle A. Lansberry
Brandon W. Ehrie
LEWIS WAGNER LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202-6150

IN THE
COURT OF APPEALS OF INDIANA

Janet L. Himself, et al.,

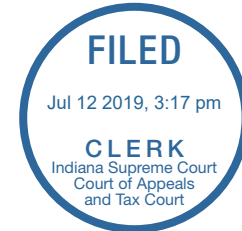
Appellants,

v.

4/9 Livestock, LLC, et al.,

Appellees.

Court of Appeals Case No.
18A-PL-645



Order

[1] Appellants, by counsel, have filed a Petition for Rehearing. Appellees, by respective counsel, have filed a Response Brief in Opposition to Petition for Rehearing.

[2] Having reviewed the matter, the Court finds and orders as follows:

Appellants' Petition for Rehearing is denied.

[3] Ordered 7/12/2019.

Brown, Altice, JJ., concur. Tavitas, J., dissents.

For the Court,

Nancy Harris Vaidik

Chief Judge

In the
Indiana Supreme Court

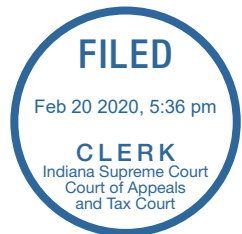
Janet L. Himself, et al.,
Appellant(s),

v.

Samuel Himself, et al.,
Appellee(s).

Court of Appeals Case No.
18A-PL-00645

Trial Court Case No.
32D04-1510-PL-150



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. The Court has heard oral argument, and each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices. Each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer. All other pending motions are denied as moot.

Done at Indianapolis, Indiana, on 2/20/2020.

FOR THE COURT

_____

LOUISE H. RUSH

Chief Justice of Indiana

All Justices concur, except Rush, C.J., and Goff, J., who vote to grant the petition to transfer.

Burns Ind. Code Ann. § 32-30-6-9

Statutes current with all present and future amendments, repeals, and enactments through P.L.167-2020, the end of the Second Regular Session of the 121st General Assembly.

Burns' Indiana Statutes Annotated > Title 32 Property (Arts. 1 — 39) > Article 30 Causes of Action Concerning Real Property (Chs. 1 — 16) > Chapter 6 Nuisance Actions (§§ 32-30-6-1 — 32-30-6-11)

32-30-6-9. Policy toward agricultural and industrial operation.

(a) This section does not apply if a nuisance results from the negligent operation of an agricultural or industrial operation or its appurtenances.

(b) The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

(c) For purposes of this section, the continuity of an agricultural or industrial operation shall be considered to have been interrupted when the operation has been discontinued for more than one (1) year.

(d) An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if the following conditions exist:

(1) There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include the following:

(A) The conversion from one type of agricultural operation to another type of agricultural operation.

(B) A change in the ownership or size of the agricultural operation.

(C) The:

(i) enrollment; or

(ii) reduction or cessation of participation;

of the agricultural operation in a government program.

(D) Adoption of new technology by the agricultural operation.

(2) The operation would not have been a nuisance at the time the agricultural or industrial operation began on that locality.

History

[P.L.2-2002, § 15](#); [P.L.23-2005, § 1](#).

Burns' Indiana Statutes Annotated
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USCS Const. Amend. 5, Part 1 of 12

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service > Amendments > Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code Service
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USCS Const. Amend. 14, Part 1 of 14

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service > Amendments > Amendment 14

Amendment 14

Sec. 1. [Citizens of the United States.]All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.]Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.]The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

In the Matter Of:

MARTIN RICHARD HIMSEL, ET AL.

-VS-

SAMUEL HIMSEL, ET AL.

JANET HIMSEL, VOL. I

May 19, 2016



CONNOR REPORTING

111 Monument Circle, Suite 4350

Indianapolis, IN 46204

Phone: 317-236-6022

Fax: 317-236-6015

Toll Free: 800-554-3376

<p>37</p> <p>1 name now.</p> <p>2 A. Julie Ann Igo.</p> <p>3 Q. Can you spell that last name?</p> <p>4 A. I-G-O.</p> <p>5 Q. Oh, that's easy. Where does Julie live?</p> <p>6 A. Lexington. Lexington, Kentucky.</p> <p>7 Q. And your other children?</p> <p>8 A. David Allen Clodfelter.</p> <p>9 Q. Where does David Allen live?</p> <p>10 A. Kind of the Beechgrove area of Indianapolis.</p> <p>11 Q. Then your third child?</p> <p>12 A. Krista Sue Cooper.</p> <p>13 Q. Does Krista live in New Palestine?</p> <p>14 A. Yes.</p> <p>15 Q. How many children does Julie Ann have?</p> <p>16 A. None. The only one that has a child is</p> <p>17 Krista. I have one grandson.</p> <p>18 Q. How old is your grandson?</p> <p>19 A. Thirteen.</p> <p>20 Q. What's his name?</p> <p>21 A. Pardon?</p> <p>22 Q. Oh, I'm sorry. What's his name?</p> <p>23 A. Alex.</p> <p>24 Q. Alex. That's a good --</p> <p>25 A. Alex Ray cooper.</p>	<p>39</p> <p>1 A. Out of the seven.</p> <p>2 Q. Out of a week?</p> <p>3 A. Yeah.</p> <p>4 Q. Okay. Your husband yesterday testified that</p> <p>5 your schedule was usually that you would be back out at</p> <p>6 the -- at his farm from Friday evening to Sunday evening;</p> <p>7 is that correct?</p> <p>8 A. Yes.</p> <p>9 Q. You heard him testify to that, right?</p> <p>10 A. Yes.</p> <p>11 Q. Do you have a job that you do out in New</p> <p>12 Palestine --</p> <p>13 A. No.</p> <p>14 Q. -- during the week?</p> <p>15 A. No.</p> <p>16 Q. Do you watch Krista's son during the week?</p> <p>17 A. I do.</p> <p>18 Q. You do? Okay.</p> <p>19 A. Well, he's old enough he doesn't need</p> <p>20 watching, but he doesn't like being home alone, so... and</p> <p>21 I'm a basketball grandma, baseball grandma.</p> <p>22 Q. And does Krista's work schedule, is it such</p> <p>23 that she works from Monday through Friday?</p> <p>24 A. Yes.</p> <p>25 Q. Where does she work?</p>
<p>38</p> <p>1 Q. Alexander?</p> <p>2 A. No. Just Alex. He was going to be Alexis,</p> <p>3 but I turned out to be Alex.</p> <p>4 Q. Alex is a good name. That's what my son's</p> <p>5 name is.</p> <p>6 Mrs. Himself, where are you living currently?</p> <p>7 A. Well, I use my address as 3581 Danville,</p> <p>8 which I get my mail there and --</p> <p>9 Q. That's where your husband lives?</p> <p>10 A. Right.</p> <p>11 Q. Okay.</p> <p>12 A. I live part-time at my daughter's.</p> <p>13 Q. At Krista Sue Cooper's?</p> <p>14 A. Yes.</p> <p>15 Q. In New Palestine. You said you live there</p> <p>16 part-time?</p> <p>17 A. Mm-hmm.</p> <p>18 Q. How often are you at your daughter's house?</p> <p>19 A. Probably five days. Depends. I still use the</p> <p>20 doctors that I've always used here, and so, some days</p> <p>21 that I have doctors' appointments or we have things like</p> <p>22 this, or, you know, just various things that we've always</p> <p>23 done together, I come back and do.</p> <p>24 Q. Okay. So, when you say five days, five days</p> <p>25 out of what?</p>	<p>40</p> <p>1 A. Allison Transmission, Indianapolis.</p> <p>2 Q. What's -- what schedule does she work, what</p> <p>3 time?</p> <p>4 A. She leaves home at 6:15, 6:30, because her</p> <p>5 work starts at 7:30, and she lives on the east side and</p> <p>6 works on the west side around Eagle Creek. So, it takes</p> <p>7 a while to drive that.</p> <p>8 Q. Does she -- is that 6:30 in the morning?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And then what time does she typically</p> <p>11 get home from work?</p> <p>12 A. 5:15 or so, because she leaves at 4:30, but</p> <p>13 she has a 45-minute drive.</p> <p>14 Q. So, is Alex in school?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. Does he ride a bus to school?</p> <p>17 A. No.</p> <p>18 Q. No? Who -- how does he get to school?</p> <p>19 A. Either his dad or myself.</p> <p>20 Q. Okay. Drop him off at school?</p> <p>21 A. Right.</p> <p>22 Q. How does he get home from school?</p> <p>23 A. He does come home most of the time on the bus.</p> <p>24 Q. Okay. When does he come home from school?</p> <p>25 A. He gets home a little before 3:00.</p>

<p>45</p> <p>1 A. Yes.</p> <p>2 Q. Did you live in Hendricks County prior to</p> <p>3 that?</p> <p>4 A. No.</p> <p>5 Q. Okay. So, you moved from out in Rockville to</p> <p>6 Richard's farm?</p> <p>7 A. Mm-hmm.</p> <p>8 Q. Okay. And when you were out in Rockville</p> <p>9 still, were you out at your parents' farm?</p> <p>10 A. When I lived in Rockville still?</p> <p>11 Q. Yeah.</p> <p>12 A. No. I owned my own home.</p> <p>13 Q. Okay.</p> <p>14 A. Before Dick and I married, I owned my own home</p> <p>15 there.</p> <p>16 Q. And was that located in town? Where was that</p> <p>17 located?</p> <p>18 A. It was in town, about three blocks from where</p> <p>19 I worked.</p> <p>20 Q. In Rockville?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. So, after that, that's when you moved</p> <p>23 to Hendricks County. The first time you moved into</p> <p>24 Hendricks County was 1994?</p> <p>25 A. Mm-hmm.</p>	<p>47</p> <p>1 Q. Do you know, does any of your medication</p> <p>2 affect your sense of smell?</p> <p>3 A. Not that I know of.</p> <p>4 Q. How many years in total -- I could probably</p> <p>5 add it up, but I'll -- I'm leery of doing that because</p> <p>6 your counsel said math and attorneys don't usually mix.</p> <p>7 How many years in total did you live out at your parents'</p> <p>8 farm?</p> <p>9 A. You mean as -- as married, it would be --</p> <p>10 Q. Either, you know, as a child growing up --</p> <p>11 total. As a child married -- as a child growing up or</p> <p>12 when you were married and living -- you had a separate</p> <p>13 house out there when you were married, is that --</p> <p>14 A. Yes.</p> <p>15 Q. But it was still located on the family farm,</p> <p>16 right?</p> <p>17 A. Yes.</p> <p>18 Q. So, I'm talking in total. How much time did</p> <p>19 you live on the family farm?</p> <p>20 A. Well, accountants aren't any better at math</p> <p>21 because they're used to using a calculator. I'm sorry.</p> <p>22 Q. That's not comforting, if you say that.</p> <p>23 A. So, from -- we moved to the farm in 1956. I</p> <p>24 lived there until I was 18; 17, 18. And then we moved --</p> <p>25 we actually lived in a small house we rented for a while,</p>
<p>46</p> <p>1 Q. Has anyone else lived with you out at</p> <p>2 Richard's farm other than Richard?</p> <p>3 A. No.</p> <p>4 Q. So, you divorced from your first husband in</p> <p>5 1993. Were you remarried prior to remarrying Richard?</p> <p>6 A. 1983.</p> <p>7 Q. Eighty -- I said '93. '83. Were you married</p> <p>8 to anyone else between that time and marrying Richard?</p> <p>9 A. No.</p> <p>10 Q. And you married Richard in 1994?</p> <p>11 A. Yes.</p> <p>12 Q. When did your former spouse die; do you</p> <p>13 recall?</p> <p>14 A. It's been, I think, two years now.</p> <p>15 Q. Mrs. Himself, are you a smoker?</p> <p>16 A. No.</p> <p>17 Q. Do you have any allergies?</p> <p>18 A. Latex, I guess. That's about all. The</p> <p>19 dentist says.</p> <p>20 COURT REPORTER: I'm sorry?</p> <p>21 A. I said, the dentist tells me that.</p> <p>22 Q. Do you take any medications?</p> <p>23 A. I am diabetic and I have -- I take the</p> <p>24 medications required for that and a high blood pressure</p> <p>25 medication.</p>	<p>48</p> <p>1 but then we built a house on my parents' farm. That was</p> <p>2 in 1998 until 1983, '82, '83, when we got a divorce.</p> <p>3 Q. You said 19 -- that was 1998 until 1983. Did</p> <p>4 you mean 1968?</p> <p>5 A. Yes. I'm sorry.</p> <p>6 Q. No. That's fine. That's fine.</p> <p>7 And during that entire time that you were</p> <p>8 living there, were there cattle, pigs, and chickens?</p> <p>9 A. Chickens, no, other than one rooster and one</p> <p>10 duck. I mean, at that point -- most of the animals came</p> <p>11 after my kids got old enough to be in 4H and they had</p> <p>12 sheep and pigs and cattle, but there was never but a</p> <p>13 few -- like two of each.</p> <p>14 Q. Okay. And I think you said earlier that the</p> <p>15 highest number of pigs on that farm at any one point was</p> <p>16 ten?</p> <p>17 A. When my dad was operating it as a farm.</p> <p>18 Q. How about -- how about when you guys lived out</p> <p>19 there on the farm?</p> <p>20 A. He didn't have livestock then except a few</p> <p>21 cattle that roamed in the back in the woods.</p> <p>22 Q. He didn't have any pigs then?</p> <p>23 A. No. He and my mother went to Florida, and so</p> <p>24 they didn't have anything like that that had to be fed</p> <p>25 and watched.</p>

<p>49</p> <p>1 Q. Did your children raise pigs for 4H? 2 A. One year. 3 Q. How many did they raise? 4 A. I think they had two. 5 Q. Okay. When your father was operating the 6 farm, what did he do with the hog manure that was 7 generated? 8 A. Well, they were out -- I mean, we had fences. 9 They were out on the fields just kind of gleaning the 10 fields in a small, you know, fenced in area. So, they 11 weren't -- the manure was out on the ground. 12 Q. Did -- let me ask this: With regard to the 13 pigs that were in the barns, did your father ever clean 14 out the barns and spread manure on his property that he 15 cleaned out from the barns? 16 A. Not from the pigs. I think he did from the 17 chickens. 18 Q. Okay. 19 A. Because there was more of that. 20 Q. Okay. How did he apply the chicken manure? 21 A. With an old manure spreader. 22 Q. And that was just put it on the surface of the 23 field? 24 A. Yes. 25 Q. Okay. How close were those fields that your</p>	<p>51</p> <p>1 A. No. 2 Q. Mrs. Himself, have you ever been convicted of a 3 crime? 4 A. Well, not yet, that I know of. 5 MS. FERRARO: Keep it that way. 6 THE WITNESS: Pardon? 7 MS. FERRARO: Keep it that way. 8 THE WITNESS: I stay away. Kind of hard to 9 get convicted when you're at home all the time, so... 10 Q. Your husband mentioned a civil lawsuit 11 involving the repair of a car. Do you recall that? 12 A. Mm-hmm. 13 Q. Other than that lawsuit -- and I assume you 14 were a party to that lawsuit as well, right? 15 A. Right. 16 Q. And that's how he described it. 17 Other than that lawsuit, have you been a party 18 to any civil lawsuits? And do you understand what I mean 19 by a civil lawsuit? 20 A. Yeah. I haven't been as far as -- 21 Q. And obviously, I mean -- and I should have 22 said this -- other than the present lawsuit where you're 23 a plaintiff. 24 A. Yeah. 25 Q. Okay. You haven't been a party to any civil</p>
<p>50</p> <p>1 father was doing that on to where you were living at the 2 time? 3 A. The field was right behind our house, 4 alongside our house, so -- 5 Q. So, it surrounded your property? 6 A. Yeah. 7 Q. Okay. Did that smell? 8 A. I -- I don't remember it smelling. We had a 9 hog farmer down the road from us. His smelled when he -- 10 but it was when he spread his on the ground. 11 Q. How did that neighboring farm -- hog farmer 12 spread his manure? Was he surface applying it? 13 A. I think so. I -- I just remember smelling it. 14 It smelled for, you know, a couple of days, and it was 15 gone. 16 Q. Do you recall any odors from the hogs that you 17 were raising or that you attributed to the hogs that you 18 were raising -- or your father was raising, I'm sorry? 19 A. Not really. 20 Q. Did your father do anything to try to control 21 odor either from the chickens, from the hogs, from the 22 cattle? 23 A. No. 24 Q. Did you consider any aspect of your father's 25 farm to be offensive or a nuisance?</p>	<p>52</p> <p>1 lawsuits? 2 A. Hm-mmm. 3 Q. Other than the car repair? Have you ever 4 filed for bankruptcy? 5 A. No. 6 Q. Richard yesterday mentioned that he had filed 7 for bankruptcy. And as we're sitting here this 8 afternoon, I can't recall if that would have been before 9 or after you were married. 10 A. Before me. 11 Q. And yesterday, he described your house in 12 Hendricks County, the farm there, and I want to go 13 through that a little bit with you. 14 First, you've lived in Hendricks County since 15 1994, correct? 16 A. Yes. 17 Q. Okay. So, that's -- again, lawyers and 18 math -- roughly 22 years? 19 A. Mm-hmm. 20 Q. And when you moved to that location in 21 Hendricks County out to the farm where you live 22 currently, you understood that there were farming 23 operations, and there were fields and farms that 24 surrounded your property, correct? 25 A. Yes.</p>

<p>85</p> <p>1 Q. Do you think that's why he hasn't had -- why 2 you haven't had it listed since December -- 3 November/December of 2013? 4 A. Personally, I think that is why. 5 Q. Has anybody told you that your property is 6 worth -- the house and the 26.7 acres is worth nothing? 7 A. I was with him the night he spoke with one of 8 the Realtors, and that's what the Realtor said. 9 Q. What Realtor said that? 10 A. Jack Lawson. It was just a casual -- you 11 know, we know them, and they stopped by our table when we 12 were eating. 13 Q. You have suggested to your husband that maybe 14 you should try re-listing the home for sale? 15 A. I did early on, right after all of this took 16 place, but... 17 Q. What was his response? 18 A. Kind of -- no. Like, you know, he just -- 19 he's attached there. So... 20 Q. Sure. Do you know, have you contacted any 21 real estate agent since December 2013 to even discuss the 22 possibility of re-listing the house? 23 MS. FERRARO: Asked and answered. You can 24 answer. 25 A. Oh. I guess I've discussed it with one person</p>	<p>87</p> <p>1 Q. Did you initiate the conversation? 2 A. I don't recall. 3 Q. Well, did she approach -- 4 A. I just -- 5 Q. I'm sorry. Go ahead. 6 A. I mentioned our situation, and, you know, 7 well, would you list this, and she wasn't interested in 8 it so -- I mean, I wasn't asking her to list it. It's 9 just she -- after she found out what was there, it was a 10 no. 11 Q. Okay. Did your husband know that you had 12 asked this Christy Brickler about the possibility of 13 whether she would list the farm? 14 A. I don't think so. 15 Q. Is there -- have you told him that you had 16 that conversation? 17 A. I may have. I don't know -- I don't -- I 18 think again at that point, he wasn't, you know, 19 interested in re-listing it anyway, so... 20 Q. Do you think this is where he wants to live? 21 A. I think so. Well, I know so. We -- like I 22 said, he's always said, I'm going to die here. 23 Q. Has he continued to say that since 4/9 built 24 the hog farm? 25 A. He hasn't said it, no.</p>
<p>86</p> <p>1 that I knew was a Realtor, and she pretty much said, oh, 2 I don't think I would want to take that on as a place to 3 sell, so... 4 Q. Who did you discuss it with? 5 A. My boss's daughter is a Realtor. 6 Q. Okay. What's her name? 7 A. Last name is Brickler, but I can't remember 8 now what her -- Chris -- Chris or something. Christine. 9 Q. Where is she a Realtor at? 10 A. I am not real sure what company she's with 11 now. I think -- I don't know. I mean, it's not somebody 12 that I see. I just knew that she was a Realtor, and... 13 Q. Do you know where her office is located? 14 A. I think maybe she works at home. I'm not 15 sure. 16 Q. Do you know where she lives, then? 17 A. I think she lives around Eagle Creek. 18 Q. In Marion County? 19 A. Yeah. Kind of in the -- where the Colts' 20 complex is. I think she lives kind of south of that 21 somewhere. Like I said, that was just a casual 22 conversation. 23 Q. When was that conversation? 24 A. Well, I didn't work there this year so, it was 25 probably the end of 2014.</p>	<p>88</p> <p>1 Q. Do you believe that that's his thinking, 2 though? 3 A. I think so. 4 MS. FERRARO: I'll just object, 5 speculation. 6 Q. You are his wife of 22 years, correct? 7 A. Yes. 8 Q. Would you say you know the man pretty well? 9 A. Probably better than I want to. 10 MS. FERRARO: Touche', counsel. 11 A. I'm sorry. Most of the time I show my heart a 12 bit. 13 Q. That's okay. You have talked to any other 14 Realtors about the possibility of selling the home and 15 the property? 16 A. No. 17 Q. Are there any major defects with the house 18 that you think might affect the value of the home? 19 A. Since 2013, we have -- we don't spend any 20 money on it, so I'm sure there's defects. You know, it's 21 an old house, two or three years sitting out in the wind 22 and sun and rain and all that. 23 Q. Is there anything that the 4/9 hog farm is 24 doing that is preventing you from, I guess, 25 maintaining -- I'll call that maintenance. Maintaining</p>

<p>89</p> <p>1 the home?</p> <p>2 A. Well, we don't want to spend money on</p> <p>3 something that we don't know what's going to happen next.</p> <p>4 We don't know how bad our smells are going to be.</p> <p>5 Q. There's nothing that the farm is doing,</p> <p>6 though, that is physically prohibiting you from</p> <p>7 maintaining the home, correct?</p> <p>8 A. No. Just the fact that it's there.</p> <p>9 Q. Do you know, does the home have any problems</p> <p>10 with mold? Has it been inspected for mold?</p> <p>11 A. I don't think so, and I don't know that it has</p> <p>12 any problems with it.</p> <p>13 Q. Has it always had a basement?</p> <p>14 A. Yes.</p> <p>15 Q. Have you ever had the basement tested for</p> <p>16 radon?</p> <p>17 A. I -- I don't think so.</p> <p>18 Q. So, you wouldn't know if there was a radon</p> <p>19 issue in the basement?</p> <p>20 A. I don't know.</p> <p>21 Q. I think I know the answer to this question</p> <p>22 based on your previous answer, but I'll ask it anyways.</p> <p>23 Have you made any improvements to the home since January,</p> <p>24 2013?</p> <p>25 A. I guess the only thing is put some different</p>	<p>91</p> <p>1 living at the home year-round?</p> <p>2 A. Yes.</p> <p>3 Q. In other words, you didn't go to somewhere</p> <p>4 during the wintertime and spend your winters elsewhere?</p> <p>5 A. No.</p> <p>6 Q. When did you first learn that 4/9 wanted to</p> <p>7 build a CAFO on the property out there?</p> <p>8 A. I can't remember. I've got whatever calendar</p> <p>9 it was I was trying to keep, and I think you've already</p> <p>10 got a copy of this. I brought it for my own. It was</p> <p>11 about April the 30th that we started hearing about it.</p> <p>12 Q. What year?</p> <p>13 A. 2013.</p> <p>14 Q. Can I see that?</p> <p>15 A. I think it should be in your papers.</p> <p>16 Q. Yeah. What is J. Smith at Abstract & Title?</p> <p>17 A. I don't know.</p> <p>18 Q. Okay.</p> <p>19 MR. EMENHISER: We can go off the record.</p> <p>20 I'm sorry. We don't need to tape this.</p> <p>21 THE VIDEOGRAPHER: We are off the record.</p> <p>22 The time is 4:12 p.m.</p> <p>23 (RECESS, 4:12 p.m. - 4:16 p.m.)</p> <p>24 THE VIDEOGRAPHER: We are back on the</p> <p>25 record. The time is 4:16 p.m.</p>
<p>90</p> <p>1 flooring in the bathroom I guess is the only thing.</p> <p>2 Q. About how much was that, was that flooring in</p> <p>3 the bathroom? Would it be proper to call it a bathroom</p> <p>4 renovation?</p> <p>5 A. No.</p> <p>6 Q. Okay. New flooring in the bathroom. How much</p> <p>7 did you spend on new flooring?</p> <p>8 A. Very little, mainly because we had the tile,</p> <p>9 the flooring.</p> <p>10 Q. I wanted to kind of button up this appraisal</p> <p>11 issue.</p> <p>12 To the best of your knowledge, the most recent</p> <p>13 appraisal on the home, is it fair to say that that would</p> <p>14 be the C.M. Bottama appraisal?</p> <p>15 A. As far as I know.</p> <p>16 Q. As far as you know, okay.</p> <p>17 A. The one that I have seen anything about</p> <p>18 anyway.</p> <p>19 Q. And what you saw of that C.M. Bottama</p> <p>20 appraisal was the first page, correct?</p> <p>21 A. Yes.</p> <p>22 Q. Did the first page have a dollar amount on it?</p> <p>23 A. I have no idea. I mean, I -- it's been a</p> <p>24 while since I've even seen it, so I don't remember.</p> <p>25 Q. Sure. That's fine. Prior to 2013, were</p>	<p>92</p> <p>1 (Deposition Exhibit 51, handwritten notes, marked for</p> <p>2 identification.)</p> <p>3 BY MR. EMENHISER:</p> <p>4 Q. Mrs. Himself, I'm handing you Deposition</p> <p>5 Exhibit 51. Can you tell me what that is?</p> <p>6 A. You're asking me about this particular page?</p> <p>7 Q. Yes. Yes. Tell me what 51 is.</p> <p>8 A. I think it was just a note. I tried to keep</p> <p>9 notes, but I gave up. This is probably about the last.</p> <p>10 Q. You had -- if you would, pull out Deposition</p> <p>11 Exhibit 40. And I'm going to have several questions for</p> <p>12 you later on this, but I kind of want to tie this up as</p> <p>13 to what 51 is.</p> <p>14 Do you have Exhibit 40?</p> <p>15 A. I do.</p> <p>16 Q. Okay. Now, do you have 51 with you as well?</p> <p>17 If you could turn to the last page of Exhibit 40. Are</p> <p>18 you there?</p> <p>19 A. Yes.</p> <p>20 Q. Do you see that there's a date entry there</p> <p>21 that appears to me to say November 16 and 17; is that</p> <p>22 correct?</p> <p>23 A. Right.</p> <p>24 Q. Okay. If you'll look at that entry and then</p> <p>25 look at page 51, does that give you a sense of what date</p>

<p>109</p> <p>1 tried to contact them and, you know, we didn't get any 2 response from any of them. 3 Q. Did someone suggest that you send this letter 4 to the Himsels? 5 A. I am not sure. 6 Q. Did your counsel suggest that you send this 7 letter? 8 MS. FERRARO: Objection. Privileged, as to 9 what I may or may not have advised or consented or 10 suggested. 11 Q. If you look at the second paragraph there, it 12 says because of your hog operation, Janet and I are now 13 constantly coughing and have sore throats. Is that a 14 statement that you would agree with? 15 A. Yes. 16 Q. How long were you constantly coughing and 17 having sore throats? 18 A. I would say we still are. 19 Q. When did it start? 20 A. When all of this went into effect. I don't 21 think it was like the first day, but, you know, after all 22 of that gets in the air, you start breathing, breathing 23 in the bad air and that's why we are concerned. 24 Q. Have you seen a doctor about your coughing and 25 sore throats?</p>	<p>111</p> <p>1 consider above which it becomes a factory? 2 A. I'd say anything over a thousand in a 3 building, but that's too many. 4 Q. Have you ever complained about the Hardens' 5 farm? 6 A. No. 7 Q. Did you know that the Hardens' farm have over 8 6,000 hogs on their farm? 9 A. I don't have any idea how many they have. 10 Q. Would you be surprised if they had that many 11 hogs on their farm? 12 A. Probably not. 13 Q. And your husband today testified that the 14 Harden farm is about a mile-and-a-half southwest of your 15 property; is that about right? 16 A. I think it would be farther, but, you know, 17 three mile or less anyway. 18 Q. Okay. 19 A. I'm not sure of the exact mileage. 20 Q. Do you know what road the Harden farm is 21 located on? 22 A. I think it's on 200. 23 Q. 200. What's the nearest crossroad? 24 A. Well, there's 425 that Ts into 200, and then 25 the next crossroad would be -- I don't -- I'm not -- I</p>
<p>110</p> <p>1 A. I have discussed it with my doctor. 2 Q. What doctor? 3 A. Dr. Jones. 4 Q. Does Dr. Jones have a first name? 5 A. Thomas H. Jones. 6 Q. And he's in Danville? 7 A. Yes, he is. 8 Q. It says here, "Her doctor advised her to limit 9 her exposure to noxious fumes." 10 Did your doctor actually say that? 11 A. Yes. 12 Q. Okay. When did the doctor suggest this? 13 A. I guess when I first brought it up to him. I 14 don't remember the exact date. I go quite often because 15 of being diabetic. 16 Q. When do you think you may have first brought 17 this up to your doctor? 18 A. It would have been in 2013. 19 Q. Was it prior to October 2013? 20 A. I don't know a specific date. 21 Q. In the next paragraph down, it says, "When 22 buyers learned about your hog factory..." what do you -- 23 what do you consider a hog factory to be? 24 A. Well, it's confined animals in a building. 25 Q. Mm-hmm. Is there a certain number that you</p>	<p>112</p> <p>1 think it's 550. 2 Q. You can get Exhibit 6 out. 3 A. Yeah. Right there. 4 Q. Is the Harden farm on there? 5 A. 200. I don't think so. I was trying to think 6 of what this is. That might be part of their house, but 7 then their hog facility is on down in here. 8 Q. Okay. 9 A. Out in the -- I mean, it's probably a quarter 10 to a half mile from their -- 11 Q. From their house? 12 A. From their house. It's down in here. 13 Q. Do you think this might be their house there? 14 A. I -- I think so. 15 Q. Okay. And that's on 200 north? 16 A. Yes. 17 Q. Okay. And that map doesn't have the crossroad 18 where the house is located, does it? 19 A. No. But this is 425 where the CAFO is, and 20 then there's -- 21 Q. What's the next road? This appears to be the 22 next road over, correct? 23 A. No. 24 Q. No? 25 A. Oh, that's not a road.</p>

<p>121</p> <p>1 MS. FERRARO: That's fine. How much more</p> <p>2 do you think you have for her?</p> <p>3 MR. EMENHISER: I've got a -- I've got a</p> <p>4 little bit. Hopefully -- her deposition is going quicker</p> <p>5 than Mr. Himself's.</p> <p>6 We can go off the record.</p> <p>7 THE VIDEOGRAPHER: This ends volume one of</p> <p>8 the deposition of Janet L. Himself. We are off the</p> <p>9 record. The time is 5:01.</p> <p>10 (RECESS, 5:01.)</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>122</p> <p>1 CERTIFICATE OF COURT REPORTER</p> <p>2 I, Marjorie Peters, Registered Merit Reporter,</p> <p>3 Certified Realtime Reporter, before whom the foregoing</p> <p>4 deposition was taken, do hereby certify that the witness</p> <p>5 was placed under oath according to the law; that the</p> <p>6 foregoing transcript is a true and correct record of the</p> <p>7 testimony given; that said testimony was taken by me</p> <p>8 stenographically and thereafter reduced to typewriting</p> <p>9 under my direction and that I am neither counsel for,</p> <p>10 related to, nor employed by any of the parties to this</p> <p>11 case and have no interest, financial or otherwise, in its</p> <p>12 outcome.</p> <p>13 I further certify that signature was not</p> <p>14 waived by the witness.</p> <p>15 I, Joanne Connor, Notary Public in the State</p> <p>16 of Indiana, do hereby certify that the witness was placed</p> <p>17 under oath according to the law.</p> <p>18 IN WITNESS WHEREOF, I have hereunto set my</p> <p>19 hand and affixed my seal this day of , 2016.</p> <p>20 <i>Marjorie Peters</i></p> <p>21 Marjorie Peters, RMR, CRR</p> <p>22 Court Reporter</p> <p>23</p> <p>24</p> <p>25 Joanne Connor</p> <p>Notary Public</p>	<p>123</p> <p>ERRATA SHEET</p> <p>1 IN RE: Himself/Lannon v. Himself/4/9 Livestock, et al.</p> <p>2 NAME: Martin Richard Himself, Volume One</p> <p>3 RETURN BY:</p> <p>4 =====</p> <p>5</p> <p>6 PAGE/LINE CORRECTION AND REASON</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24 (DATE) (DEPONENT SIGNATURE)</p> <p>25 NOTARY PUBLIC:</p>
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Janet Himself, Vol. I
May 19, 2016

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1 MS. FERRARO: That's fine. How much more
2 do you think you have for her?

3 MR. EMENHISER: I've got a -- I've got a
4 little bit. Hopefully -- her deposition is going quicker
5 than Mr. Himself's.

6 We can go off the record.

7 THE VIDEOGRAPHER: This ends volume one of
8 the deposition of Janet L. Himself. We are off the
9 record. The time is 5:01.

10 (RECESS, 5:01.)

11

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x Janet L. Himself

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In the Matter Of:

MARTIN RICHARD HIMSEL

VS

SAMUEL T. HIMSEL

JANET HIMSEL, VOL. II

May 20, 2016



CONNOR REPORTING

111 Monument Circle, Suite 4350

Indianapolis, IN 46204

Phone: 317-236-6022

Fax: 317-236-6015

Toll Free: 800-554-3376

<p>183</p> <p>1 A Yes.</p> <p>2 Q Prior to the construction of the hog barns, the</p> <p>3 land where the hog barns currently exist was</p> <p>4 used for growing crops; correct?</p> <p>5 A Yes.</p> <p>6 Q Okay. And they were used for growing crops all</p> <p>7 the way up until the hog barns were constructed;</p> <p>8 correct?</p> <p>9 A Yes.</p> <p>10 Q Okay. Were there any conditions on that</p> <p>11 property, prior to the construction of the hog</p> <p>12 barns, that you would say were causing you</p> <p>13 injuries to your health?</p> <p>14 A No.</p> <p>15 Q Were there any conditions on the property where</p> <p>16 the barns are located, prior to the construction</p> <p>17 of the barns, which you would say were indecent,</p> <p>18 offensive?</p> <p>19 A No.</p> <p>20 Q Were there any conditions on that property where</p> <p>21 the 4/9 barns are located, prior to their being</p> <p>22 construction -- constructed, that you would say</p> <p>23 obstructed the use of your property?</p> <p>24 A No.</p> <p>25 Q And were there any conditions on that property</p>	<p>185</p> <p>1 regard to the 4/9 CAFO?</p> <p>2 A I don't know.</p> <p>3 Q Okay. Can you give me any examples of</p> <p>4 unreasonable conduct based -- again, based on</p> <p>5 your firsthand knowledge, of Co-Alliance with</p> <p>6 regard to the 4/9 CAFO?</p> <p>7 MS. FERRARO: I'm just going to object to</p> <p>8 the extent that understanding what "unreasonable</p> <p>9 conduct" is within a legal context is.</p> <p>10 So I'll object, that calls for a legal</p> <p>11 conclusion, as to your prior three questions on</p> <p>12 that.</p> <p>13 You may answer.</p> <p>14 A And I don't know.</p> <p>15 Q Mrs. Himself, what do you consider unreasonable</p> <p>16 conduct?</p> <p>17 A I guess I would think purposely dumping their</p> <p>18 manure outside their facility or, you know,</p> <p>19 harming the other neighbors.</p> <p>20 Q Do you have any firsthand knowledge that any of</p> <p>21 those people, Samuel Himself, Cory Himself, or</p> <p>22 Clinton Himself, or Co-Alliance have purposely</p> <p>23 dumped manure outside of the 4/9 facility?</p> <p>24 A I have none.</p> <p>25 Q Okay. Do you have any examples, based on your</p>
<p>184</p> <p>1 where the 4/9 barns are now located that you</p> <p>2 would say, prior to their construction,</p> <p>3 interfered with your property or your style of</p> <p>4 living?</p> <p>5 A No.</p> <p>6 Q Turn to paragraph 34 of Exhibit 39, if you</p> <p>7 would. Are you there? I'm sorry.</p> <p>8 A (The witness complies.)</p> <p>9 Q Are you there?</p> <p>10 A I am, yes.</p> <p>11 Q Okay. Paragraph 34 starts out by saying, "The</p> <p>12 Defendants' unreasonable conduct."</p> <p>13 Can you give me any -- based on your</p> <p>14 firsthand knowledge -- examples of what you</p> <p>15 would consider "unreasonable conduct" by Samuel</p> <p>16 Himself?</p> <p>17 A Well, regarding the CAFO, I don't know.</p> <p>18 Q Can you give me any examples, based on your</p> <p>19 firsthand knowledge, of what you would consider</p> <p>20 unreasonable conduct by Cory Himself with regard</p> <p>21 to the 4/9 CAFO?</p> <p>22 A I don't know.</p> <p>23 Q Can you give me any examples based on your</p> <p>24 firsthand knowledge of what you would consider</p> <p>25 unreasonable conduct by Clinton Himself with</p>	<p>186</p> <p>1 firsthand knowledge, of conduct by 4/9 Livestock</p> <p>2 that you would consider unreasonable?</p> <p>3 A No.</p> <p>4 MS. FERRARO: Continuing objection based on</p> <p>5 legal conclusion to that question as well.</p> <p>6 Q Mrs. Himself, did you talk to any media outlets</p> <p>7 regarding the 4/9 CAFO?</p> <p>8 A No.</p> <p>9 Q Okay. You were here during your husband's</p> <p>10 deposition and we talked about various articles</p> <p>11 and --</p> <p>12 A Right.</p> <p>13 Q -- and interviews with various media outlets.</p> <p>14 Were you present during those interviews?</p> <p>15 A No, I was not.</p> <p>16 Q Okay. And have you submitted any letters to the</p> <p>17 editors of papers regarding the 4/9 CAFO?</p> <p>18 A No.</p> <p>19 Q Is there any reason why you haven't spoke to any</p> <p>20 media outlets regarding the 4/9 CAFO or this</p> <p>21 lawsuit?</p> <p>22 A I just was not there when they did that.</p> <p>23 Q Okay. Has anyone contacted you and asked to</p> <p>24 speak with you?</p> <p>25 A No.</p>

<p>187</p> <p>1 Q Okay. I asked your husband this and he chided 2 me that based on his age, the answer should be 3 obvious. But I'll ask you whether you have a 4 Facebook account? 5 A I do. 6 Q You do? Okay. What's the address for that? 7 A I guess I don't know. 8 Q Okay. 9 MS. FERRARO: I'll just object based on 10 relevance. 11 But you can answer. 12 A I don't remember. Does it come through on your 13 email account? 14 Q I don't have a Facebook account so I don't know 15 if asking for the address is -- 16 A I don't do anything on it. I look at the little 17 dogs that jump up and down on the couch or 18 whatever. 19 Q That was my next question is have you ever 20 commented on Facebook account, or any social 21 media, regarding either the 4/9 CAFO or this 22 lawsuit? 23 A I don't comment on Facebook. 24 Q Okay. 25 A Except for cute dogs and babies.</p>	<p>189</p> <p>1 A Yes. 2 Q Are those the -- are those items interfering 3 with your enjoyment of your property? 4 A I think so, yes. 5 Q How -- 6 A The odor in particular does. 7 Q Okay. How so? Describe that for me. How are 8 they interfering with the use and enjoyment of 9 your property? 10 A You don't go outside and sit on the patio. You 11 don't invite friends in. You don't know what 12 day it's going to smell. You just don't plan 13 things that involve people that might be -- you 14 know, a lot of people can't tolerate it. 15 Q Prior to the construction of the 4/9 Farm, how 16 frequently would you host at your home outdoor 17 gatherings? 18 A Probably once a year. 19 Q Once a year? Okay. 20 Mrs. Himsel, do you consider all 21 objectionable smells to be nuisances or 22 offensive, or is it just that there's an 23 intensity or frequency that you can't tolerate? 24 A There's an intensity to this and it makes it 25 hard to tolerate if you smell it, you know,</p>
<p>188</p> <p>1 Q Okay. How about any other social media? 2 A No. 3 Q Do you believe that the 4/9 Farm has created 4 conditions on your property that have injured 5 your health? 6 A The odor that comes across our property. 7 Q Okay. 8 A As far as what it's going to do to our water and 9 the creek, we don't know yet. 10 Q And do you find that odor indecent or offensive? 11 A Yes. 12 Q Okay. Other than the odor, is there anything 13 else that's obstructing your use of the 14 property? 15 MS. FERRARO: Objection. Calls for an 16 expert opinion. 17 Q In your opinion -- 18 A Mainly, the odor. My lack of sleep some nights 19 with the trucks. Other than that, that's 20 probably about it. 21 Q Okay. So there's some occasional noise 22 associated with the semis? 23 A Yes. 24 Q Okay. And I think you also mentioned the pickup 25 truck as well?</p>	<p>190</p> <p>1 several days in a row. 2 Q Okay. And, so, in your own words, when does the 3 smell cross the line from being, you know, 4 something that's just objectionable to becoming 5 a nuisance? 6 A Kind of one of those things that's hard to say 7 when you don't have a meter on it, but when you 8 feel like you want to just throw up. Your 9 stomach doesn't feel good. 10 Q Have you ever vomited as a result of the smell 11 on the farm? 12 A No, because I try to not be there a lot of 13 times. 14 Q If you would, pull out Exhibit 40 and 51, I 15 believe it is. 16 (Exhibits 40 and 51 previously marked for 17 identification.) 18 A Uh-huh. 19 Q They look like this (indicating), okay? 20 A Yeah. 21 MR. EMENHISER: Do you have it, Counsel? 22 MS. FERRARO: Yep. 23 A Oh, I didn't -- I have -- that's 5 -- 24 Q That's 51. 25 A That's 51. It looked like a 7, I'm sorry.</p>

<p>195</p> <p>1 Q Okay.</p> <p>2 A It was just the construction of the buildings.</p> <p>3 Q Well, we'd ask you to go ahead and pull any</p> <p>4 pictures of the 4/9 Farm from your phone that</p> <p>5 you have and your counsel, we'd ask copies of</p> <p>6 those.</p> <p>7 MS. FERRARO: Sure.</p> <p>8 Q Did you have permission to take pictures of the</p> <p>9 4/9 property?</p> <p>10 A No.</p> <p>11 Q Did you contact any of the Himselfs and tell</p> <p>12 them, "Hey, I'm going to take some pictures of</p> <p>13 your buildings"?</p> <p>14 A No. I wasn't on their property when I took the</p> <p>15 pictures.</p> <p>16 Q Okay. Let me ask you, did you take any video as</p> <p>17 well?</p> <p>18 A No.</p> <p>19 Q The next page, which is Bates-labeled</p> <p>20 Plaintiffs-52, there's an entry for 10/3/13.</p> <p>21 Do you see that?</p> <p>22 A Uh-huh.</p> <p>23 Q Says, "South barn" -- I believe this -- if I'm</p> <p>24 not reading this correctly, please, let me know.</p> <p>25 Says, "South barn of hog farm factory filled</p>	<p>197</p> <p>1 So was October 3rd the first day that you</p> <p>2 noticed poor-smelling air?</p> <p>3 A I think it was a few days after. I think I've</p> <p>4 got, what, the 4th and the 6th.</p> <p>5 Q You're correct, yeah. The next entry says,</p> <p>6 "October 4th, 2013, first day of poor air</p> <p>7 quality."</p> <p>8 A Uh-huh.</p> <p>9 Q Is that consistent with your memory of the first</p> <p>10 day that there was poor air quality?</p> <p>11 A Yes.</p> <p>12 Q And, then, also on the 6th, it says, "Smell in</p> <p>13 our house is terrible."</p> <p>14 Is that correct?</p> <p>15 A Yes.</p> <p>16 Q And did you write -- do you believe that you</p> <p>17 wrote these entries on those dates, October 3rd,</p> <p>18 October 4th, October 6th?</p> <p>19 MS. FERRARO: Objection. Asked and</p> <p>20 answered.</p> <p>21 A Yes.</p> <p>22 Q Okay. Did you keep a diary or a -- I mean, just</p> <p>23 note entries on the computer in addition to this</p> <p>24 written diary?</p> <p>25 A I think only the ones that were prior in here</p>
<p>196</p> <p>1 with baby pigs."</p> <p>2 Is that what it says?</p> <p>3 A Uh-huh.</p> <p>4 Q Is that your recollection of when the farm first</p> <p>5 was filled with pigs?</p> <p>6 A That's when we saw the first trucks --</p> <p>7 Q Okay.</p> <p>8 A -- going in.</p> <p>9 Q Could it have been filled prior to that and you</p> <p>10 not know about it?</p> <p>11 A Well, there were times they could have put them</p> <p>12 in there and maybe we weren't home. I have no</p> <p>13 idea.</p> <p>14 But we did see trucks going in, you know,</p> <p>15 right after they got the buildings built.</p> <p>16 Q So October 3rd is the first time that you saw</p> <p>17 pigs going in?</p> <p>18 A I assume there were pigs with the -- I don't</p> <p>19 think they run around with those trucks just for</p> <p>20 no reason.</p> <p>21 Q Okay.</p> <p>22 A I don't know, you know.</p> <p>23 Q And the next line says, "Fans going pushing</p> <p>24 smelly air directly to" -- or "direct to us with</p> <p>25 southwest prevailing wind."</p>	<p>198</p> <p>1 that I commented, I thought they were just</p> <p>2 things I typed on the computer.</p> <p>3 Q The notes that we talked about earlier?</p> <p>4 A Yes. There were a couples pages, I think</p> <p>5 that --</p> <p>6 Q I think it was Exhibits 24 and 25, I believe.</p> <p>7 A Yeah, I don't remember.</p> <p>8 Q Mrs. Himself, did you think it was important for</p> <p>9 you to record when you were smelling</p> <p>10 objectionable odors?</p> <p>11 A I believe so.</p> <p>12 Q Does your diary identify all the times that you</p> <p>13 were smelling objectionable odors?</p> <p>14 MS. FERRARO: Objection. Asked and</p> <p>15 answered.</p> <p>16 A No.</p> <p>17 Q We've been going for a while here, Mrs. Himself.</p> <p>18 Are you okay? Do you need a break?</p> <p>19 A It would probably be nice.</p> <p>20 MR. EMENHISER: Okay. Why don't we take a</p> <p>21 break.</p> <p>22 THE VIDEOGRAPHER: We are off the record at</p> <p>23 10:24 a.m.</p> <p>24 (A recess was taken.)</p> <p>25 THE VIDEOGRAPHER: We are back on the</p>

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1 record at 10:32 a.m.
2 BY MR. EMENHISER:
3 **Q Mrs. Himsel, I want to talk about the smell that**
4 **you mentioned earlier.**
5 **Do you smell the objectionable smell from**
6 **the outside of your home?**
7 A Outside, inside.
8 **Q Okay. Does the intensity of the smell change,**
9 **or is it consistent?**
10 A It depends on the wind. It affects someone in
11 our neighborhood, you know, wherever they live.
12 There's someone that's always affected by it.
13 **Q You mentioned the wind. Is it more frequent,**
14 **less frequent, or more intense, less intense**
15 **during certain other weather conditions?**
16 A Foggy.
17 **Q Foggy?**
18 A Low ceiling, it holds it down there with us.
19 **Q Do you have any firsthand knowledge that the**
20 **objectionable smells are caused by the 4/9 hog**
21 **operation?**
22 MS. FERRARO: Objection. Calls for an
23 expert opinion.
24 A We've never had them before until that went in.
25 **Q Do you have -- strike that.**

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1 **How long have the -- if you know, how long**
2 **have the Hardins been operating their hog farm?**
3 A Well, since I've actually just been a Hendricks
4 County person, since '94, and I know it was
5 there prior to that. I don't know exactly when
6 it began, but at least from '94.
7 **Q And they're located southwest of your current**
8 **residence?**
9 A Yes.
10 **Q Okay. How do you know that the smell that**
11 **you're complaining of isn't attributable to the**
12 **Hardin farm?**
13 A We never have smelled the Hardin farm prior to,
14 you know, when the 4/9 went in.
15 **Q Okay.**
16 A We never smelled it. I think our neighbors,
17 there's some south that probably have because
18 they're on the same 200. We have quite a
19 barrier with the woods between us.
20 **Q In all the years that you've lived out there**
21 **from 1994 until 2013, had you ever smelled a**
22 **manure smell at your residence?**
23 A No.
24 **Q Never?**
25 A No.

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1 **Q When the Hardins applied manure to the fields**
2 **around your property, did you ever smell a**
3 **manure smell?**
4 A Vaguely sometimes, but nothing that was -- that
5 irritated, you know. It dissipates right away
6 after they put it in, you know, maybe, you know,
7 that day or the next day you don't smell
8 anything.
9 **Q Did you observe the Hardins putting the manure**
10 **on the fields?**
11 A I have a couple of times.
12 **Q And I think that you said that your recollection**
13 **is they knife it in?**
14 A I think so.
15 **Q Okay. And how far, estimated, number of feet**
16 **from your home are the fields where the Hardins**
17 **apply manure?**
18 MS. FERRARO: Objection. Asked and
19 answered.
20 A One field's probably 20, 30 feet.
21 **Q Okay. And they've applied manure to that field?**
22 A Uh-huh.
23 **Q Have you seen -- well, have you seen the 4/9 --**
24 **anybody from 4/9 applying manure to fields?**
25 A I personally haven't, but this is the first year

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1 I actually would have been home every day,
2 but -- because I was at work.
3 **Q Okay.**
4 A And a lot of that stuff happens when -- during
5 the day when I'm not there.
6 **Q Yeah, okay. So you've never seen anybody you**
7 **believed to be associated with the 4/9 Farm**
8 **applying manure?**
9 A Not recently.
10 **Q Well, "not recently" suggests to me that you**
11 **might have seen them at some point.**
12 A Well, they have a farm that's directly east of
13 us that it's easier to see. And I -- you know,
14 we're kind of in a rolling situation where we
15 don't really see. You know, I'll see a tractor,
16 but I really don't pay attention to what's
17 behind it.
18 And that's been in prior years before this
19 went in. They've always spread manure and
20 knifed it in.
21 **Q And they knife it in?**
22 A Yes.
23 **Q Okay. That was going to be my question, if you**
24 **seen how the 4/9 Livestock applies its manure.**
25 **But your understanding is that at least with**

<p>203</p> <p>1 regard to the Himsels' other farms, they knife 2 in their manure? 3 A Yes. 4 Q Do you have any firsthand knowledge of how 4/9 5 actually applies manure? 6 A No. 7 Q Have you ever -- well, strike that. 8 Are you aware of the appropriate agronomic 9 rates to use when applying manure? 10 MS. FERRARO: Objection. Calls for and 11 expert opinion. 12 Q Do you have any personal knowledge of the 13 appropriate agronomic rates when using -- 14 A I have no idea. 15 Q Have you made any suggestions to any of the 16 defendants here in this case about how to lessen 17 the odor problem that you're complaining of? 18 A I have not. 19 Q Why not? 20 A We just don't interfere in what they're doing, 21 and I don't go tell them how to run their 22 business. Hopefully, they should be good 23 managers and know how to do it themselves. 24 Q Based on your own personal knowledge, can you 25 think of anything that can be done to abate the</p>	<p>205</p> <p>1 them. I assume that's knifing it in. 2 Q Okay. 3 A I'm not real familiar with all the equipment and 4 what it looks like. 5 Q Where are the fields that they apply to located 6 with regard to your house? 7 A Probably a mile. 8 Q A mile. What direction? 9 A North. North and west of us. 10 Q North and west, okay. 11 Any other farmers? 12 A I'm sure there are. I don't know them. I don't 13 see them. 14 Q Okay. Have you ever associated any odors 15 when -- or experienced any odors when the 16 Thomases were applying manures to field? 17 A No. 18 Q Okay. We've identified the Hardin farm. 19 Do you know of any other livestock farms, 20 let's say, within two or three miles of your 21 home? 22 MS. FERRARO: Objection. Asked and 23 answered. 24 A I think the Pruitts and the Pritchards, I'm not 25 sure what their -- how their name's pronounced.</p>
<p>204</p> <p>1 odor problem that you're complaining of? 2 A I think there are products out there. I don't 3 know much about them. 4 Q Are they products -- do you believe that there 5 are products that can be placed into the pits to 6 address the odor? 7 A I don't know what they do with them. I've just 8 heard there's additives or something they put in 9 the feed, or -- 10 Q So additives for the feed. 11 Do you think that there -- I'll just ask 12 you the question. Do you think that there are 13 things that can be added to the pits, as well, 14 to address the odor? 15 A I assume there is. I don't know personally. 16 Q Other than the Hardins and the Himsels, are 17 there any other farmers that you've seen 18 applying manure to the fields around your 19 property? 20 A Just one. 21 Q Who is that? 22 A Thomases. I think they apply it to some of 23 their fields. 24 Q Do you know how the Thomases apply manure? 25 A I think they -- I know there's a tank behind</p>	<p>206</p> <p>1 I think Pruitts have some cattle and hogs. The 2 others have cattle. 3 Q Anyone else that you can recall? 4 A Not in that close proximity, no. 5 Q What direction from your home are the Pruitts 6 located? 7 A East. 8 Q Okay. And the Pritchards? 9 A East. 10 Q Okay. Do you know if those farms cause 11 objectionable odors? 12 A No, they don't. 13 Q Have you been on those farms before? 14 A Not on them. I drive by them. Never have 15 smelled anything. 16 Q Mrs. Himsel, are you claiming that the 17 defendants have trespassed on your property? 18 MS. FERRARO: Objection. Calls for a legal 19 conclusion. 20 A As far as the odor, yes. 21 Q Okay. Other than the odor, are you claiming 22 that anything from the plaintiffs -- or the 23 defendants have physically invaded your 24 property? 25 MS. FERRARO: Objection. Calls for a legal</p>

<p>207</p> <p>1 conclusion and an expert opinion.</p> <p>2 A They don't normally come on our property.</p> <p>3 Q Okay. Has any manure from the 4/9 facility come</p> <p>4 onto your property?</p> <p>5 A I don't know that at the time. We have a creek</p> <p>6 that they're -- you know, they're afraid that</p> <p>7 might.</p> <p>8 Q Do you have any firsthand knowledge that any</p> <p>9 manure has come onto your property?</p> <p>10 A No, no.</p> <p>11 Q You've been talking about semis and trucks that</p> <p>12 got to the 4/9 property.</p> <p>13 Have any of those semis come onto your</p> <p>14 property?</p> <p>15 A No.</p> <p>16 Q Have any of those trucks from the 4/9 property</p> <p>17 come onto your property?</p> <p>18 A Not to my knowledge.</p> <p>19 Q Okay. And you're not aware of 4/9 -- you don't</p> <p>20 have any firsthand knowledge that 4/9 has</p> <p>21 applied manure to your property; correct?</p> <p>22 A No.</p> <p>23 Q What damage do you believe has been caused by</p> <p>24 any trespass by the defendants?</p> <p>25 MS. FERRARO: Objection. Calls for a legal</p>	<p>209</p> <p>1 A There's a lot of people suffering because they</p> <p>2 built a home there, the Stainfields in</p> <p>3 particular, they were just devastated because</p> <p>4 they had just moved out there. They had taken</p> <p>5 their retirement money out to buy a nice home</p> <p>6 and, you know, they just feel like they've kind</p> <p>7 of lost everything, and as we do too.</p> <p>8 Q Mrs. Himself, do you believe that any of the</p> <p>9 defendants -- and when I say "any of the</p> <p>10 defendants," understand there's 4/9 Livestock is</p> <p>11 a defendant, Co-Alliance, and then the</p> <p>12 individual Himselfs.</p> <p>13 Do you believe that any of defendants are</p> <p>14 operating the farm in a careless or</p> <p>15 irresponsible manner?</p> <p>16 MS. FERRARO: Objection. Calls for a legal</p> <p>17 conclusion.</p> <p>18 A You know, I have no idea specifically what they</p> <p>19 might have done.</p> <p>20 Q I think you said earlier you don't have any</p> <p>21 knowledge of how 4/9 is operating the farm; is</p> <p>22 that correct?</p> <p>23 A I do not, no.</p> <p>24 Q And do you have any knowledge of how, or if,</p> <p>25 Co-Alliance is operating the farm?</p>
<p>208</p> <p>1 conclusion and an expert opinion.</p> <p>2 A Well, again, it's the odor.</p> <p>3 Q The odor? Okay.</p> <p>4 A The odor is -- you know, you don't want to go</p> <p>5 outside. You don't want to do anything. You</p> <p>6 don't want to have anyone come to your home. I</p> <p>7 don't live there three-fourths of the time, so</p> <p>8 that's damage. I can't enjoy my home, so --</p> <p>9 Q Okay. Do you have any firsthand knowledge that</p> <p>10 Co-Alliance has done anything to cause odor to</p> <p>11 come onto your property?</p> <p>12 MS. FERRARO: Objection. Calls for an</p> <p>13 expert opinion.</p> <p>14 A Well, if they provide the pigs.</p> <p>15 Q Provide the --</p> <p>16 A That's where the odor comes from.</p> <p>17 Q Mrs. Himself, do you believe that any of the</p> <p>18 defendants are operating the farm in an illegal</p> <p>19 manner?</p> <p>20 MS. FERRARO: Objection. Calls for a legal</p> <p>21 conclusion.</p> <p>22 A I would say not. They -- you know, they just</p> <p>23 made a bad choice of where to put it around all</p> <p>24 the homes that are there.</p> <p>25 Q Okay.</p>	<p>210</p> <p>1 A I do not.</p> <p>2 Q And you have no personal knowledge of how, or</p> <p>3 if, in their individual capacities any of the</p> <p>4 individual Himself Defendants, and by that I</p> <p>5 mean, Sam, Cory, and Clint, are operating the</p> <p>6 farm?</p> <p>7 MS. FERRARO: Objection. Calls for a legal</p> <p>8 conclusion.</p> <p>9 A I don't -- I'm sorry.</p> <p>10 MS. FERRARO: As to individual capacity.</p> <p>11 Go ahead, you can answer.</p> <p>12 A I don't.</p> <p>13 Q Do you have any firsthand knowledge of spills of</p> <p>14 manure from the 4/9 Farm?</p> <p>15 A I do not.</p> <p>16 Q Do you have any firsthand knowledge of any IDEM</p> <p>17 noncompliance associated with the 4/9 Farm?</p> <p>18 A I don't.</p> <p>19 Q Do you have any firsthand knowledge of any</p> <p>20 federal regulatory noncompliance related to the</p> <p>21 4/9 Farm?</p> <p>22 A I don't.</p> <p>23 Q Do you have any knowledge or evidence -- strike</p> <p>24 that.</p> <p>25 Do you have any firsthand knowledge that</p>

<p>239</p> <p>1 MS. FERRARO: We'll take a break. 2 THE VIDEOGRAPHER: We are off the record at 3 11:27 a.m. 4 (A lunch recess was taken.) 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>241</p> <p>1 Q Is -- well, let me scratch that. 2 When you say "physical maintenance," were 3 you thinking about the remodeling, or were you 4 thinking about your gardening and other things 5 that you could do outside that you have not been 6 able to do since the defendants' CAFO has been 7 built? 8 A I don't do things outside. I don't do gardening 9 anymore. Gardening, for me, was doing the 10 flowers and stuff; but I just don't do it 11 because I can't go out in the smell. 12 Q Okay. So would you, then, be sort of clarifying 13 your answer to counsel's question that there is 14 no reason why you haven't done physical 15 maintenance to your home? 16 A Well, the fact that we can't go outside and 17 enjoy it. 18 Q So there is a physical reason why you have 19 not -- 20 A Right. 21 Q -- done physical maintenance -- 22 A Right. 23 Q -- at least on the outside of your home? 24 A Yeah. I was thinking of, like, painting and 25 washing windows and things, which I don't go out</p>
<p>240</p> <p>1 AFTERNOON SESSION 2 THE VIDEOGRAPHER: We are back on the 3 record at 12:34 p.m. 4 CROSS-EXAMINATION, 5 QUESTIONS BY MS. KIM E. FERRARO: 6 Q Mrs. Himself, I'm going to be jumping around a 7 little bit. We've covered quite a bit of ground 8 with your testimony and answers to questions by 9 Mr. Emenhiser who represents the defendants; so 10 bear with me a little bit. 11 I'd like to go back to a topic that was 12 discussed yesterday. You were asked about -- 13 you were asked about your inability, or whether 14 or not you had done maintenance on your home 15 since the defendants' CAFO had been built. 16 Do you remember that testimony? 17 A Yes. 18 Q And I believe your answer to the question of 19 whether or not there was any reason that you 20 hadn't done physical work on your home since the 21 defendants' CAFO had been built, was there was 22 no reason for it, you didn't have any reason why 23 you hadn't done that maintenance. 24 Do you recall that testimony? 25 A Yes.</p>	<p>242</p> <p>1 and do that either for the same reason. 2 Q For the record, then, could you describe to us 3 what it is that you used to do prior to the 4 defendants' CAFO being built that you are no 5 longer doing with respect to physically 6 maintaining the outside of your home? 7 A Well, we used to apply, like, a truckload of 8 mulch around all the flowers, have all the weeds 9 pulled and, you know, of course, purchase new 10 flowers to put in, and always kept everything 11 manicured. He mainly did the mowing. It's 12 always been manicured. It's not anymore. So we 13 just can't enjoy our outside. 14 Q I heard Richard testify yesterday that you 15 really enjoy gardening; is that true? 16 A Yes. 17 Q Do you garden outdoors any longer? 18 A No, huh-uh. Got weeds in the flowerbeds. 19 Q How does that make you feel? 20 A Well, it makes both of us feel bad because we've 21 not been used to living with things unkept like 22 they are now. 23 Q So it's embarrassing to you? 24 A Right. 25 Q Is that also a reason why you --</p>

<p style="text-align: right;">247</p> <p>1 because we just don't -- we don't know what's 2 going to happen. You know, if we're going to 3 have to live there like it is, we still don't 4 want to spend any money on it if no one else is 5 going to want to live there like it is either. 6 Q Okay. I just want to confirm -- I'm going to 7 switch gears for a minute. 8 If you could pull out Exhibits 26 and 52. 9 (Exhibit 26 previously marked for 10 identification.) 11 A (The witness complies.) 12 Q Tell me when you're ready. 13 A I'm ready. 14 Q You're ready. 15 MS. FERRARO: Counsel, do you have them? 16 MR. EMENHISER: I do, thank you. 17 MS. FERRARO: You're not fumbling around 18 like I was? 19 Q Okay. So I'm showing you Exhibit 26 which is 20 the partial transcript of the Hendricks County 21 Area Plan Commission hearing, and it says, as 22 I'm sure you can see it, the paragraph there, 23 "In the matter of zoning"-- well, "ZA 418/13 24 Samuel T. Himsel; a zoning amendment change from 25 AGR/Agricultural Residential District to</p>	<p style="text-align: right;">249</p> <p>1 certain -- no? Okay. 2 Q I believe defense counsel took you to -- let's 3 see -- to page 45 of Exhibit 49, which is the 4 2008 Hendricks County Zoning Ordinance, and 5 asked you to confirm whether or not a CAFO is 6 allowed in the AGI, or the Agricultural Intense 7 District. 8 Do you recall that testimony? 9 A Yes. 10 Q And you looked there and saw that there was a P 11 in the column under AGI and saw that, yeah, that 12 CAFOs are allowed in the AGI district. 13 Do you remember that answer? 14 A Yes, yes. 15 Q If you could look in the column right next to 16 under AGR, the Agriculture Residential District, 17 are CAFO's permitted in that district? 18 A No. 19 Q And you heard the testimony of your husband 20 yesterday, but, actually, I'll ask you, do you 21 know what your property is zoned as? 22 A The AGR. 23 Q And do you know what the -- do you know what the 24 defendants' -- what Sam Himsel's property was 25 zoned prior to the rezoning?</p>
<p style="text-align: right;">248</p> <p>1 AGI/Agriculture Intense District." 2 Do you see that? 3 A Yes. 4 Q And do you recall you were asked some questions 5 about who the applicant was for the rezoning 6 decision, and I believe you testified that it 7 was 4/9 Livestock. 8 But in looking at this, does that change 9 your opinion about who the applicant for the 10 zoning amendment change was? 11 A Yes. It was just Sam, Sam Himsel. 12 Q Similarly, the -- looking at Exhibit 52, which 13 is the ordinance, the rezoned ordinance that was 14 actually issued on March 26th, 2013, do you see 15 who that was issued to on there? 16 And I'm looking at section 1. Do you see 17 who the -- 18 A It was Sam Himsel also. 19 Q Okay. So not 4/9 Livestock? 20 A Right. 21 Q Okay. If you could go to Exhibit 49. This is 22 what it is, Zoning Ordinance. 23 A (The witness complies.) 24 THE WITNESS: Did you have these -- you had 25 them separated. Did you have them in a</p>	<p style="text-align: right;">250</p> <p>1 A It was AGR before. 2 Q And, so, both of your properties were 3 respectively AGR districts? 4 A Right. 5 Q Since you've lived there in 1994, I believe -- 6 no, you moved in in '97? 7 A No, '94. 8 Q '94. Since that time -- from that time forward, 9 there hadn't been a rezoning, to your knowledge? 10 A No. 11 Q So the area was AGR, or that sort of a 12 residential -- ag residential use, to your 13 knowledge, since 1997; correct? 14 A Yes. 15 Q If you could turn to page 415 -- I'm sorry. 16 Turn to page 4-17. 17 A (The witness complies.) 18 Q And this is the district's intent, the county's 19 intent for the AGR/Agricultural Residential 20 Districts. 21 Do you see that? 22 A Yes. 23 Q And it says that the county's intent in creating 24 the AGR district "is to permit the establishment 25 of individual single-family dwellings while</p>

<p>263</p> <p>1 defendants, including the named individual 2 defendants were there; correct? 3 A Yes. 4 Q And they heard your concerns, presumably, if 5 they were there; correct? 6 A Yes. 7 Q Okay. So one can assume that they heard what 8 you said; correct? 9 A I guess. I would have to assume. You know, you 10 don't know what someone else has heard, but -- 11 Q Okay. Well, in -- strike that. We'll move on. 12 I think this is probably going to be my 13 last question. 14 You were also asked whether or not the 15 defendants, the named defendants, have caused 16 anything, any physical objects, or any physical 17 invasion of your property. 18 Do you recall that testimony? 19 A Yes. 20 Q You said that you weren't aware of any manure 21 coming on your property; correct? 22 A At this time, no. 23 Q You did state that you felt odors had come onto 24 your property; correct? 25 A Yes.</p>	<p>265</p> <p>1 be in the air at your home; is that correct? 2 A That's correct. 3 Q And the reason that you're not aware of what 4 constituents may be in the air at your home is 5 because in two years -- over two years since the 6 CAFO has come into operation, you haven't had 7 the -- you haven't bothered to have the air 8 tested, have you? 9 A We didn't know that we could measure the air. 10 Q You didn't know that air could be tested? 11 A We've been to the planning zoning, the -- 12 Mrs. Stanfield. Also, at the -- the Barbara Sha 13 Cox meetings. You know, they said, "Well, 14 there's no way to test odor." So we didn't 15 think there was any way to test odor. 16 Q Okay. 17 A And probably over three years that might have 18 changed, I don't know. 19 Q Well, you haven't bothered to have your air 20 sampled; correct? 21 A No, not -- 22 Q How do you know that the air on your property is 23 contaminated then? 24 MS. FERRARO: Objection. That 25 mischaracterizes her testimony.</p>
<p>264</p> <p>1 Q And you're not aware of what constituents may 2 be -- air pollutants might be in those odors; 3 correct? 4 A That's correct. Yes. 5 Q But to the extent that there are some sort of 6 air contaminants that may be causing those 7 odors, those have physically come onto your 8 property, haven't they? 9 A Yes, yes. 10 MS. FERRARO: Mrs. Himsel, I thank you for 11 sitting here yesterday and today, but I think 12 that's all I have. 13 MR. EMENHISER: I'll have some follow-up, 14 but let's take a quick break. 15 MS. FERRARO: Sure. 16 THE VIDEOGRAPHER: We are off the record at 17 1:09 p.m. 18 (A recess was taken.). 19 THE VIDEOGRAPHER: We are back on the 20 record at 1:14 p.m. 21 REDIRECT EXAMINATION, 22 QUESTIONS BY MR. JONATHAN P. EMENHISER: 23 BY MR. EMENHISER: 24 Q Mrs. Himsel, you mentioned just a moment ago 25 that you were not aware of what constituents may</p>	<p>266</p> <p>1 Q Are you claiming that the air on your property 2 is contaminated? 3 A With the odor, yes. You know, the reason we had 4 the sore throats and the eye irritation, the 5 dust that can come from the fans and the -- you 6 know, there's pig dander, there's feed dust. 7 Q You have no idea of the amount of dust that's in 8 your air, though; correct? 9 A No, not at this time. 10 Q And you have no idea of the amount of pig 11 dan- -- you called it "pig dander," that might 12 be in your air; correct? 13 A No, right. 14 Q And that's because you haven't bothered to have 15 your air tested; right? 16 MS. FERRARO: Objection. Argumentative. 17 "Bothered"? I think she testified that she 18 didn't know they could get their air tested. 19 Q And that's because you haven't had your air 20 tested; correct? 21 A That is correct. And I stated many times, I 22 know at least three or four, that, you know, 23 they put that thing out there. They should be 24 protecting the people that are close to it. 25 We're not the only ones that are being</p>

<p>267</p> <p>1 affected by it, even though they haven't filed a 2 lawsuit, they're still bothered by the smells, 3 the dander -- or the, you know, dust particles, 4 whatever is in it. I guess because my kids 5 showed 4-H, I've seen it come off of the pigs. 6 I'm sure they're in there rubbing against each 7 other. 8 Q You've visually seen pig dander in the air; is 9 that correct? 10 A Not at my house, but I have seen it, yes. 11 Q You mentioned early -- or your counsel asked you 12 unreasonable actions, and you mentioned, or 13 counsel may have mentioned, dumping manure on 14 your property. 15 You're not claiming that 4/9, or any of the 16 defendants, have actually dumped manure on your 17 property, are you? 18 A No, no. 19 Q Okay. I just wanted to clarify that. 20 A That was just an example of an infraction that I 21 would think would happen to us if -- but it has 22 not at this point. 23 Q And you also testified during examination by 24 your counsel that you had the right to 25 participate in the zoning hearings; correct?</p>	<p>269</p> <p>1 ability to object, the property was rezoned AGI; 2 correct? 3 A Yes. 4 Q And being rezoned as AGI meant that one of the 5 permitted uses was to place a CAFO on the 6 property; correct? 7 A Right in the middle of an AGR area where there 8 are many homes, many homes. 9 Q But a property zoned AGI means that a permitted 10 use is a -- a CAFO is a permitted use on that 11 property; correct? 12 A I understand that, yes. 13 Q And when the property was rezoned as AGI, that 14 occurred prior to 4/9 seeking a permit from IDEM 15 for the construction and operation of the CAFO; 16 correct? 17 A Correct. 18 Q It occurred -- the rezoning decision to AGI 19 occurred before 4/9 began constructing the 20 barns; correct? 21 A Yes. 22 Q And the rezoning occurred prior to 4/9 operating 23 the farm; correct? 24 A Yes. 25 Q Okay. Do you have any firsthand knowledge of</p>
<p>268</p> <p>1 A Yes. 2 Q And you attended the zoning hearings? 3 A I did. 4 Q And you could have retained an attorney to go to 5 the zoning hearings with you; correct? 6 A Uh-huh. 7 Q Is there any reason why you and your group did 8 not retain an attorney? 9 A I think we were like any other group that was 10 opposed to something. We had no idea what we 11 were facing at that point. That was early on. 12 I mean, we didn't just run out and start hiring 13 attorneys and trying to fight someone. 14 I mean, none of us are really geared to 15 being combative or irritated at our neighbors. 16 But when someone does this to you, sure, you get 17 upset. Everyone's upset. 18 Q And you had the right to appeal the zoning 19 decision; correct? 20 A Yes. 21 Q And you did not appeal the zoning decision, did 22 you? 23 A No. 24 Q And after the hearing, after the ability to 25 participate in the hearing, and after the</p>	<p>270</p> <p>1 what IDEM does and does not regulate? 2 A No. 3 Q Okay. Do you know if IDEM regulates CAFOs? 4 A I don't know. They're supposed to inspect them, 5 I assume. 6 Q Okay. Do you believe that IDEM has inspected 7 this CAFO? 8 MS. FERRARO: Asked and answered. 9 A I don't get on their property. I don't know 10 whether they have inspected it. 11 Q Okay. 12 A And that's another reason I think we should be 13 informed, you know, if there has been an 14 inspection, you know, it's -- to me, it would be 15 a common practice that they'd be required to do. 16 Q Have you ever been on the IDEM website? 17 A No, not on it specifically. 18 Q Okay. I understand that you didn't contact IDEM 19 with regard to the 4/9 Farm. 20 Did you ever contact the EPA with -- the 21 United States Environmental Protection Agency 22 with regard to the 4/9 Farm? 23 A No. 24 Q Do you know if the United States Environmental 25 Protection Agency monitors air?</p>

<p>279</p> <p>1 deposition. We are off the record at 1:31 p.m. 2 AND FURTHER THE DEPONENT SAITH NOT. 3</p> <p>4 JANET L. HIMSEL 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>281</p> <p>1 person in this cause of action; that I am not a 2 relative or attorney of either party, or otherwise 3 interested in the event of this action, and am not 4 in the employ of the attorneys for either party. 5 IN WITNESS WHEREOF, I have hereunto set my 6 hand and affixed my notarial seal this _____ day 7 of _____, 2016. 8 <i>Judith E. Bellinger</i> 9 10 NOTARY PUBLIC 11 12 My Commission Expires: 13 March 25, 2024 14 County of Residence: 15 Marion County 16 17 18 19 20 21 22 23 24 25</p>
<p>280</p> <p>1 STATE OF INDIANA) 2) SS: 3 COUNTY OF MARION) 4 I, Judith E. Bellinger, RPR, CRR, CSR No. 5 94-R-1044, a Notary Public in and for the County of 6 Marion, State of Indiana at large, do hereby 7 certify that the deponent herein, JANET L. HIMSEL, 8 was by me first duly sworn to tell the truth, the 9 whole truth, and nothing but the truth in the 10 aforementioned matter; 11 That the foregoing deposition was taken on 12 behalf of the Defendants at the offices of 13 Harrington Law, PC, 105 North Washington Street, 14 Danville, Hendricks County, Indiana, on the 20th 15 day of May, 2016, commencing at the hour of 16 8:57 a.m., pursuant to the Indiana Rules of Trial 17 Procedure; 18 That said deposition was taken down in 19 stenograph notes and afterwards reduced to English 20 under my direction, and that the transcript is a 21 true record of the testimony given by said 22 deponent; and that the signature of said deponent 23 to her deposition was requested; 24 That the parties were represented by their 25 counsel as aforementioned. I do further certify that I am a disinterested</p>	

Janet Himself, Vol. II
May 20, 2016

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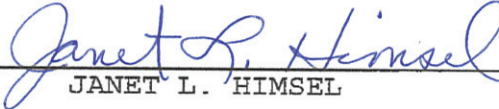
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1 deposition. We are off the record at 1:31 p.m.

2 AND FURTHER THE DEPONENT SAITH NOT.

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JANET L. HIMSELF

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In the Matter Of:

MARTIN RICHARD HIMSEL, ET AL.

-VS-

SAMUEL HIMSEL, ET AL.

MARTIN RICHARD HIMSEL, VOL. I

May 18, 2016



CONNOR REPORTING

111 Monument Circle, Suite 4350

Indianapolis, IN 46204

Phone: 317-236-6022

Fax: 317-236-6015

Toll Free: 800-554-3376

<p>1 STATE OF INDIANA) IN THE HENDRICKS SUPERIOR COURT 2)SS: 3 HENDRICKS COUNTY) CAUSE NO. 32D04-1510-PL-000150 4 5 MARTIN RICHARD HIMSELF, JANET L.) 6 HIMSELF, ROBERT J. LANNON and) 7 SUSAN M. LANNON,) 8) 9 Plaintiffs,) 10) 11 vs.) 12) 13 SAMUEL T. HIMSELF, CORY M. HIMSELF,) 14 CLINTON S. HIMSELF, 4/9 LIVESTOCK,) 15 LLC, and CO-ALLIANCE, LLP,) 16 Defendant.) 17 18 - - - - - 19 VIDEOTAPED DEPOSITION OF MARTIN RICHARD HIMSELF 20 VOLUME ONE 21 Wednesday, May 18, 2016, 8:59 a.m. 22 23 Harrington Law, PC 24 105 North Washington Street 25 Danville, Indiana</p>	<p>3 1 COUNSEL PRESENT: 2 For the Attorney General of Indiana: 3 Brian L. Park, Esquire 4 OFFICE OF INDIANA ATTORNEY GENERAL 5 302 West Washington Street 6 Indianapolis, IN 46204-770 7 brian.park@atg.in.gov 8 ALSO PRESENT: 9 Joanne Connor, videographer 10 Elizabeth A. South 11 Vice President and General Council, Co-Alliance 12 13 I N D E X 14 15 EXAMINATION PAGE 16 MARTIN RICHARD HIMSELF 17 BY MR. PARK 7 18 BY MR. EMENHISER 20 19 20 DEPOSITION EXHIBIT DESCRIPTION PAGE 21 Exhibit 1- 1983 Comprehensive Plan 28 22 Exhibit 2- 2006 Comprehensive Plan 31 23 Exhibit 3- 1998 Comprehensive Plan 32 24 Exhibit 4- Figure 7, 1998 Comprehensive Plan 32 25 Exhibit 5- future land use plan 34 26 Exhibit 6- aerial map 39 27 Exhibit 7 - Indianapolis News article 59 28 Exhibit 8 - newspaper article 71 29 Exhibit 9 - abstracted judgment 76</p>
<p>2 1 VIDEOTAPED DEPOSITION OF MARTIN RICHARD HIMSELF, 2 a witness herein, called by the Defendants for 3 examination, taken pursuant to the Indiana Rules of Trial 4 Procedure, by and before Marjorie Peters, a Registered 5 Merit Reporter, Certified Realtime Reporter and Joanne 6 Connor, Notary Public in and for the State of Indiana, at 7 Harrington Law, PC, 105 North Washington Street, 8 Danville, Indiana, on Wednesday, May 18, 2016, at 9 8:59 a.m. 10 COUNSEL PRESENT: 11 For the Plaintiff: 12 Kim E. Ferraro, Esquire 13 Jordan Anne Chelovich, Esquire 14 HOOSIER ENVIRONMENTAL COUNCIL 15 407 E. Lincolnway 16 Suite A 17 Valparaiso, IN 46383 18 kferraro@hecweb.org 19 For the Defendants Samuel T. Himself, Cory M. Himself, 20 4/9 Livestock, LLC, and Co-Alliance, LLP: 21 22 Jonathan P. Emehiser, Esquire 23 PLEWS SHADLEY RACHER & BRAUN LLP 24 1346 North Delaware Street 25 Indianapolis, IN 46202 jemenhiser@psrb.com For the Defendant Clinton S. Himself, Brandon W. Ehrie, Esquire LEWIS WAGNER LLP 501 Indiana Avenue Suite 200 Indianapolis IN 46202-6150 behrie@lewiswagner.com</p>	<p>4 1 DEPOSITION EXHIBIT DESCRIPTION PAGE 2 Exhibit 10 - release of lien 78 3 Exhibit 11 - articles 83 4 Exhibit 12 - articles 85 5 Exhibit 13 - warranty deed 104 6 Exhibit 14 - warranty deed 106 7 Exhibit 15 - title search report 111 8 Exhibit 16 - notice of federal tax lien 113 9 Exhibit 17 - mortgage 115 10 Exhibit 18 - assessment 118 11 Exhibit 19 - amendment to listing contract 121 12 Exhibit 20 - letter 131 13 Exhibit 21 - letter 142 14 Exhibit 22 - letter 143 15 Exhibit 23 - Kruse Consulting letter 145 16 Exhibit 24 - (unidentified document) 150 17 Exhibit 25 - notes 151 18 Exhibit 26 - excerpt of transcript 151 19 Exhibit 27 - County document 165 20 Exhibit 28 - Hendricks County Area Planning 21 Commission Findings of Fact/Law 168 22 Exhibit 29 - letter 173 23 Exhibit 30 - letter 179 24 Exhibit 31 - IDEM document 183 25 Exhibit 32 - email 204</p>

<p style="text-align: right;">25</p> <p>1 Q. Who do you live with at your current house?</p> <p>2 A. My wife, when she's able to be there.</p> <p>3 Q. What do you mean by that?</p> <p>4 A. She can't take the hogs' smell that strong.</p> <p>5 Q. Well, how frequently is your wife at the</p> <p>6 house?</p> <p>7 A. Basically from Friday evening until Sunday</p> <p>8 evening.</p> <p>9 Q. She's there on the weekends?</p> <p>10 A. Yes.</p> <p>11 Q. Does your wife work?</p> <p>12 A. No. Not right now.</p> <p>13 Q. When she's not at your house, where does she</p> <p>14 live?</p> <p>15 A. Her daughter.</p> <p>16 Q. What's her daughter's name?</p> <p>17 A. Krista.</p> <p>18 Q. Is that with a K?</p> <p>19 A. Yes.</p> <p>20 Q. What's Krista's last name?</p> <p>21 A. Cooper.</p> <p>22 Q. Where does Krista Cooper live?</p> <p>23 A. New Palestine.</p> <p>24 Q. Does anyone else live with you at your house?</p> <p>25 A. No.</p>	<p style="text-align: right;">27</p> <p>1 Q. Any other children?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. Please give me their names.</p> <p>4 A. Richard Alan.</p> <p>5 Q. Where does Richard live?</p> <p>6 A. Beaver Dam, Ohio.</p> <p>7 Q. What does he do?</p> <p>8 A. He's the department head for Lowe's</p> <p>9 Corporation.</p> <p>10 Q. Any other children?</p> <p>11 A. Angela Ann Kim.</p> <p>12 Q. Where does Angela live?</p> <p>13 A. New York, Manhattan, and Sarasota, Florida.</p> <p>14 Q. Mr. Himself, what were the names of your</p> <p>15 parents?</p> <p>16 A. Arthur Robert and Helen Marvel Huls.</p> <p>17 Q. Was your father a County Commissioner?</p> <p>18 A. Yes.</p> <p>19 Q. How long?</p> <p>20 A. 28 years.</p> <p>21 Q. Was your father a County Commissioner when</p> <p>22 Hendricks County approved its comprehensive land and</p> <p>23 zoning plan?</p> <p>24 A. Say that again.</p> <p>25 Q. Sure. Was your father a County Commissioner</p>
<p style="text-align: right;">26</p> <p>1 Q. Since 2013 has anyone other than your wife</p> <p>2 lived with you at your house?</p> <p>3 A. No.</p> <p>4 Q. And you are currently married?</p> <p>5 A. Yes.</p> <p>6 Q. And your wife's full name?</p> <p>7 A. Janet Louise Himself.</p> <p>8 Q. And how long have you been married?</p> <p>9 A. Since September 10, 1994.</p> <p>10 Q. Were you married prior -- were you previously</p> <p>11 married to another person?</p> <p>12 A. Yes.</p> <p>13 Q. What was her name?</p> <p>14 A. Jean Esther Himself.</p> <p>15 Q. How long were you married to Jean Himself?</p> <p>16 A. Approximately 26 years.</p> <p>17 Q. When were you divorced?</p> <p>18 A. In the early '90s.</p> <p>19 Q. Is your former spouse still alive?</p> <p>20 A. Yes.</p> <p>21 Q. Where does she live, do you know?</p> <p>22 A. Broadway Street here in Danville.</p> <p>23 Q. You said you have a son. What's your son's</p> <p>24 name, again?</p> <p>25 A. Christopher Arthur Himself.</p>	<p style="text-align: right;">28</p> <p>1 when Hendricks County approved its comprehensive land and</p> <p>2 zoning plan?</p> <p>3 A. Probably. I can't say for sure.</p> <p>4 Q. Did he have a role in that plan, do you know?</p> <p>5 A. I'm sure he did.</p> <p>6 Q. Let me get this. Let's mark this as Exhibit</p> <p>7 1.</p> <p>8 (Deposition Exhibit 1, 1983 Hendricks County</p> <p>9 Comprehensive Plan, was marked for identification.)</p> <p>10 MS. FERRARO: So much for not killing</p> <p>11 trees.</p> <p>12 MR. EMENHISER: I killed a few. I'll have</p> <p>13 you guys share this one.</p> <p>14 Q. Mr. Himself, you've got what's been marked as</p> <p>15 Deposition Exhibit 1 in front of you. I'll represent to</p> <p>16 you that it's the 1983 Hendricks County Comprehensive</p> <p>17 Plan. Have you seen this document before?</p> <p>18 A. No.</p> <p>19 Q. No.</p> <p>20 Would you turn to page nine -- actually, I'm</p> <p>21 sorry, it's not -- it's not a numbered page. I think</p> <p>22 it's the ninth page in. The ninth and the tenth page in.</p> <p>23 Kim, do you care if I help the witness?</p> <p>24 MS. FERRARO: Oh, go for it. You may have</p> <p>25 to help me, too.</p>

<p>33</p> <p>1 want to look in the plan itself, you can find it about 2 halfway through; but I wanted to ask you a question on 3 it, and I thought color might be more helpful to you. 4 If you take a look at Exhibit No. 4 in the 5 legend, you will see that most of Marion Township, the 6 vast majority of Marion Township is planned as 7 agricultural use. 8 Would you agree that that is -- that is an 9 accurate statement as to what Figure 7 is showing? 10 A. Yes. 11 Q. And would you agree that that is how the 12 majority of land out in Marion Township was used in 1998 13 and going forward? 14 A. Yes. 15 Q. Now, Exhibit 2 is the 2006 Comprehensive Plan, 16 and I'll ask you, have you seen this document before? 17 A. No. 18 Q. Okay. If you will, turn to the page that's 19 marked 55 on the 2006 plan. 20 MS. FERRARO: You're in Exhibit 2, is that 21 correct? 22 MR. EMENHISER: On Exhibit 2, yes. Sorry. 23 Q. You will see that there is another land use 24 map for the 2006 Comprehensive Plan. Again, there is a 25 color version of that. I'm going to have that marked as</p>	<p>35</p> <p>1 background. 2 Why don't you just start, after you graduated 3 high school, what was your first job? 4 A. Farming. 5 Q. Farming. Who did you farm for? 6 A. Dad. With Dad. 7 Q. And did you farm at the location where you 8 currently live? 9 A. Yes. 10 Q. What did you farm; was it a livestock farm, 11 was it crops? 12 A. Mostly livestock. 13 Q. What type of livestock? 14 A. A few cattle and a few hogs. 15 Q. What's a few? 16 A. 200 head of cattle and 200 head of hogs a 17 year. 18 Q. Where did you live in relation to that farm 19 that had 200 head of cattle and 200 head of hogs? 20 A. On the farm. 21 Q. Approximately how far away was the house from 22 where -- let's start with the cattle -- from where the 23 cattle were located? 24 A. 400 feet. 25 Q. How far was the house from where the hogs were</p>
<p>34</p> <p>1 Exhibit 5 to make things a little easier for reference 2 here. 3 (Deposition Exhibit 5, future land use plan, was marked 4 for identification.) 5 Q. If you will take a look at Exhibit 5, you will 6 see that it says future land use plan; do you see that? 7 A. I guess. 8 Q. Exhibit 5 is the color version. 9 And if you will look at the legend and the 10 coloring on that, would you agree that Marion Township, 11 once again, in the 2006 Comprehensive Plan is zoned for 12 agricultural purposes? 13 A. Yes. 14 Q. So, would you agree that all of the Hendricks 15 County Comprehensive Plans have zoned the land where you 16 live and the land surrounding where you live as 17 agricultural, at least as far back as 1983? 18 A. Yes. 19 Q. Mr. Himself, are you a smoker? 20 A. No. 21 Q. Have you ever smoked? 22 A. No. 23 Q. Does your spouse smoke? 24 A. No. 25 Q. Let me ask you about your employment</p>	<p>36</p> <p>1 located? 2 A. Basically the same. 3 Q. Were they in the same barn? 4 A. Same barn, and then on the fields around the 5 house. He was totally against confinement buildings. He 6 totally defied those things, and his belief was to run 7 hogs out on the ground. 8 Q. Would the hogs come into the barn 9 occasionally? 10 A. I assume every day. 11 Q. Okay. Well, how long did you farm with your 12 father? 13 A. Until his death in '83. 14 Q. So, that whole time that you were farming with 15 your father, were you living at the farm there? 16 A. No. 17 Q. Okay. How long did you live at the farm when 18 you were farming with your father? 19 A. Until I was married in September 1966. 20 Q. Where did you move to in '66? 21 A. I lived in a home that at present David Himself 22 lives in. 23 Q. Where is that located? 24 A. It's on Road 200 West, over by where all of 25 the hog smells are over east of us.</p>

<p>37</p> <p>1 Q. Where the hogs smells are east of you?</p> <p>2 A. Where the main operation of the Himself.</p> <p>3 Q. Okay. The 4/9 Livestock farm?</p> <p>4 A. I have no idea where that's at. I rented off</p> <p>5 of his dad, Lee Himself, a small home, for two years.</p> <p>6 Q. Did you have -- you farmed with your father.</p> <p>7 Did you have your own farm as well at some point?</p> <p>8 A. I had a 120-acre farm.</p> <p>9 Q. Where was that located?</p> <p>10 A. On Road 200.</p> <p>11 Q. What did you raise there?</p> <p>12 A. Just a few hogs and a few cattle and some</p> <p>13 grain.</p> <p>14 Q. Again, define for me "a few hogs."</p> <p>15 A. 150 a year.</p> <p>16 Q. What's "a few cattle"?</p> <p>17 A. 30 head.</p> <p>18 Q. Over what period of time were you raising</p> <p>19 these hogs and the cattle at your farm on 200?</p> <p>20 A. Repeat the question.</p> <p>21 Q. Sure. Over what period of time were you</p> <p>22 raising these hogs and cattle at your farm on Road 200?</p> <p>23 A. From the time I purchased the farm in the '70s</p> <p>24 through the '90s. To the '90s.</p> <p>25 Q. Did you live at a house on that farm as well?</p>	<p>39</p> <p>1 Q. Okay. Did you live there from '68 to '76?</p> <p>2 A. No. I was married in '66. Lived at Lee</p> <p>3 Himself's for two years until '68, and then from '68 I</p> <p>4 moved to a home on Road 200.</p> <p>5 Q. Okay. I think earlier you had said that you</p> <p>6 had lived at -- rented the place from Lee Himself in '76</p> <p>7 and '78; did you mean '66?</p> <p>8 A. Yes. When we were first married.</p> <p>9 MR. EMENHISER: Should have probably done</p> <p>10 this earlier. Let's mark this.</p> <p>11 (Deposition Exhibit 6, aerial map, was marked for</p> <p>12 identification.)</p> <p>13 Q. Mr. Himself, you've been handed what's been</p> <p>14 marked as Deposition Exhibit No. 6, which is an aerial</p> <p>15 satellite image. Do you recognize the properties -- you</p> <p>16 see that there are roads marked there. Do you recognize</p> <p>17 any of the properties on here?</p> <p>18 A. Yes.</p> <p>19 Q. Do you recognize where your current residence</p> <p>20 is located?</p> <p>21 A. Yes.</p> <p>22 Q. Can I have you put a circle around, or draw an</p> <p>23 outline around your current residence with a -- I guess</p> <p>24 with that pen. And if you could mark it current</p> <p>25 residence.</p>
<p>38</p> <p>1 A. No.</p> <p>2 Q. No?</p> <p>3 A. (Witness shakes head back and forth.)</p> <p>4 Q. There was no house there?</p> <p>5 A. No.</p> <p>6 Q. Where were you actually living at at that</p> <p>7 time?</p> <p>8 A. Up until '76, I lived at home. For two years,</p> <p>9 I lived at a rented house from Lee Himself; and then after</p> <p>10 that I moved to a home on Road 200, the first home where</p> <p>11 I raised my family.</p> <p>12 Q. I'm sorry. The first. Okay.</p> <p>13 So, how long did you live at the house where</p> <p>14 you rented from Lee Himself?</p> <p>15 A. Two years.</p> <p>16 Q. Do you recall the period of time, the years?</p> <p>17 A. '76 to '78, I would guess.</p> <p>18 Q. Then you moved to a home on Road 200; correct?</p> <p>19 A. Yes.</p> <p>20 Q. Is that in 1978?</p> <p>21 A. '68.</p> <p>22 Q. Huh?</p> <p>23 A. '68.</p> <p>24 Q. You moved into a home on Road 200 in 1968?</p> <p>25 A. Yes.</p>	<p>40</p> <p>1 A. (The witness marked the exhibit.)</p> <p>2 Q. Do you recognize where the 4/9 Livestock barns</p> <p>3 are?</p> <p>4 A. Yes.</p> <p>5 Q. Why don't you circle those and put 4/9 next to</p> <p>6 it.</p> <p>7 A. (The witness marked the document.)</p> <p>8 Q. Now I want to get back to where you said you</p> <p>9 lived on 200. Is that on this map?</p> <p>10 A. Yes.</p> <p>11 Q. Could you circle that area, and put -- you</p> <p>12 said you lived there from '70 -- or '68 to '87; is that</p> <p>13 right?</p> <p>14 A. Closer to around '90, I guess.</p> <p>15 Q. Okay. Well, could you circle that and put '68</p> <p>16 to -- or whatever years you lived there. And could you</p> <p>17 put RH, and then the years that you lived there.</p> <p>18 A. (The witness marked the exhibit.)</p> <p>19 Q. Have you done that?</p> <p>20 A. Yes.</p> <p>21 Q. Where is that located, for my reference? Is</p> <p>22 that right there? Okay.</p> <p>23 A. (Nods head up and down.)</p> <p>24 Q. Is that where the farm was as well, did you</p> <p>25 have a farm there as well?</p>

<p>41</p> <p>1 A. Just 12 acres.</p> <p>2 Q. 12 acres. Okay. You said that you were</p> <p>3 raising a few hogs, you said 150 per year, and a few</p> <p>4 cattle. Is that the location of where you were raising</p> <p>5 those?</p> <p>6 A. No.</p> <p>7 Q. Is that farm located on here?</p> <p>8 A. Yes.</p> <p>9 Q. Where is that?</p> <p>10 A. South of the factory.</p> <p>11 Q. Well, is it still on 425 West?</p> <p>12 A. Yes.</p> <p>13 Q. Is that area now farm ground?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Why don't you put a square around that,</p> <p>16 and put RH Farm, and then put the years that you had it.</p> <p>17 A. (The witness marked the exhibit.)</p> <p>18 Q. Have you done that?</p> <p>19 A. Yes.</p> <p>20 Q. Can I see it. Okay. Put a square around some</p> <p>21 buildings immediately south of the 4/9 barns. Were those</p> <p>22 buildings that were there when you were farming?</p> <p>23 A. Yes.</p> <p>24 Q. So, those were the buildings that you used?</p> <p>25 A. Yes.</p>	<p>43</p> <p>1 hogs that you were raising and the cattle?</p> <p>2 A. Hog houses.</p> <p>3 Q. Hog houses. How big was the hog house?</p> <p>4 A. Normally 16 foot by 10 foot. And small,</p> <p>5 individual hog houses for use for baby pigs.</p> <p>6 Q. How big were those?</p> <p>7 A. Eight by eight.</p> <p>8 Q. How many hogs would each hog house hold?</p> <p>9 A. The big ones probably -- when they were</p> <p>10 smaller, maybe 45, and up -- the big was 30.</p> <p>11 Q. Okay. How many of those hog houses did you</p> <p>12 have?</p> <p>13 A. I remember five.</p> <p>14 Q. Did that include the smaller ones as well?</p> <p>15 A. No. I had eight small, individual ones that I</p> <p>16 used for baby pigs.</p> <p>17 Q. How many baby pigs would you put in the small</p> <p>18 houses?</p> <p>19 A. The mother, plus anywhere from seven to 11.</p> <p>20 Once a year.</p> <p>21 Q. Would you consider the hog operation that you</p> <p>22 had to be a confined feeding operation?</p> <p>23 A. No.</p> <p>24 Q. Why not?</p> <p>25 A. Didn't have exorbitant, fancy buildings with</p>
<p>42</p> <p>1 Q. At the time you were using that area, you</p> <p>2 lived north of that still on 425; correct?</p> <p>3 A. From '68 on.</p> <p>4 Q. From '68 on. Okay.</p> <p>5 So, about how far would you say that is from</p> <p>6 where your home was that you were living to the farm</p> <p>7 where you were raising the cattle and the hogs?</p> <p>8 A. 120 rod.</p> <p>9 (Court Reporter asked for clarification.)</p> <p>10 Q. Do you have an estimate of how many feet that</p> <p>11 is?</p> <p>12 A. 1920 feet.</p> <p>13 Q. 1900 feet. Okay. Thank you.</p> <p>14 Mr. Himself would you consider yourself to be a</p> <p>15 progressive farmer, when you were farming?</p> <p>16 A. No.</p> <p>17 Q. No.</p> <p>18 When I said progressive farmer, what -- and</p> <p>19 you said no, what did you take progressive to mean?</p> <p>20 A. Enlarged growth, out twisting arms of all the</p> <p>21 neighbors for new ground and stuff like that, and I was</p> <p>22 not doing that.</p> <p>23 Q. Were you willing to try new technologies?</p> <p>24 A. Not really.</p> <p>25 Q. What type of facilities did you have for the</p>	<p>44</p> <p>1 slats and manure pits and things like that. Most usually</p> <p>2 they ran out on the lots and the fields of the farm.</p> <p>3 Q. What ran out on the lots and the fields?</p> <p>4 A. The hogs.</p> <p>5 Q. The hogs. Okay.</p> <p>6 What happened to the manure that the hogs</p> <p>7 generated?</p> <p>8 A. It was never a confined thing. It was maybe,</p> <p>9 for maybe example of this table, there might be one big</p> <p>10 dropping on it.</p> <p>11 Q. In the barn?</p> <p>12 A. In the fields.</p> <p>13 Q. In the fields. Were there any -- what</p> <p>14 happened with the manure that the hogs generated in</p> <p>15 barns?</p> <p>16 A. We bedded the barns, kept it bedded; and once</p> <p>17 a month, hauled out four or five loads and spread it on</p> <p>18 the fields.</p> <p>19 Q. How did you spread it on the fields?</p> <p>20 A. Manure spreader.</p> <p>21 Q. Okay. Was it surface application, or did you</p> <p>22 inject it?</p> <p>23 A. Injection was never heard of at that time, no.</p> <p>24 Q. Okay. What fields were you applying the</p> <p>25 manure on?</p>

<p style="text-align: right;">45</p> <p>1 A. It depended upon rotating on the crops. Where 2 the crops were, there was one, two, three, five fields 3 and it was rotated. 4 Q. Okay. 5 A. And it maybe amounted to three to four acres 6 at a time. 7 Q. All right. Are the fields that you -- you 8 said there were five fields that you would rotate 9 through. Are those fields located on this map? 10 A. Yes. 11 Q. Okay. Why don't you outline those fields and 12 put R. Himself application. 13 A. (The witness marked the exhibit.) 14 Q. Can I see that? Show me where -- is it these 15 fields back here? 16 A. There was one there. 17 Q. Okay. 18 A. One there. One there. One there, and one 19 there. (Indicating on the document.) 20 Q. Okay. So, they were the fields surrounding 21 the barns where the hogs were located? 22 A. Yes. 23 Q. Okay. At the time -- 24 A. It was usually put on high fields. High 25 hills.</p>	<p style="text-align: right;">47</p> <p>1 A. It was intermixed with the hog, and basically 2 disposed of together. 3 Q. Okay. Mr. Himself, at that time how did the 4 size of your hog farm compare to other hog farms in 5 Hendricks County? 6 A. Small. 7 Q. Who owned the hogs that you were raising? 8 A. I did. 9 Q. Did you ever have a contract with Hendricks 10 County Co-Op? 11 A. Years later. 12 Q. Okay. Tell me about that. 13 A. I don't remember a whole heck of a lot about 14 it. They forced me into building a very small 15 confinement building which, thank God, two years later 16 was destroyed by fire, and put us completely out of hog 17 operation; but I don't think I ever had more than three 18 to 400 head of hogs at one time through their contracts. 19 I worked with a guy by the name of Paul Gerth. 20 Q. Where is Paul Gerth; is he still alive? 21 A. No. 22 Q. All right. Well, let's talk about your answer 23 there. You said that they forced you into building a 24 small confinement building. What do you mean "they 25 forced you into building a confinement building"?</p>
<p style="text-align: right;">46</p> <p>1 MS. FERRARO: Richard, do you need a break? 2 Are you doing okay? 3 A. I'm fine. 4 MS. FERRARO: Okay. 5 BY MR. EMENHISER: 6 Q. At the time you were raising the hogs, were 7 you also raising cattle at the same time? 8 A. Yes. 9 Q. And you said you had approximately 30 head? 10 A. Yes. 11 Q. What did you do with the -- well, first of 12 all, were those cattle also located in those barns? 13 A. Yes. 14 Q. There on 425? 15 A. They were only located in those barns for the 16 purpose of feeding. 17 Q. Okay. 18 A. The rest of the time, they were running out on 19 the pasture, the grass pasture. 20 Q. Where was the pasture? 21 A. Right directly behind the buildings. 22 Q. On 425 there? 23 A. Yes, about ten acres. 24 Q. Okay. What did you do with the cow manure 25 that was generated?</p>	<p style="text-align: right;">48</p> <p>1 A. That might be a strong word, but they said if 2 I wanted to continue to raise hogs with them, that I 3 would have to update to a confinement building of some 4 type. 5 Q. What time period was this? 6 A. What's that? 7 Q. I'm sorry. What time period are we talking 8 about, what years? 9 A. Maybe around 1980. 10 Q. So, now I need to go back. And the hogs that 11 you were talking about earlier, the 150 per year and a 12 few cattle; how long were you doing that before you 13 increased the amount of hogs to in excess of 300? 14 A. It was about the same time. I never did 15 increase the number of cattle, but I did do away with the 16 hogs. 17 Q. You did away with the hogs, or you increase 18 the number of hogs? 19 A. I did away with my own owned hogs. 20 Q. And you did build a confinement building? 21 A. Yes. 22 Q. How many hogs did that confinement building 23 hold? 24 A. Best I can remember, around 400 head. 25 Q. And tell me about the set-up of that building.</p>

<p style="text-align: right;">49</p> <p>1 How was manure collected in that building? 2 A. It had an eight-foot pit underneath it. 3 Q. Where was that building located? 4 A. At the residence place. 5 Q. At your residence up on 425 and 350? 6 A. Yes. 7 Q. Okay. Put a circle or identify on that map 8 where the confinement building was, and put R. Himself 9 confinement for me. 10 A. (The witness marked the exhibit.) What do you 11 want me to put there again. It's already been circled 12 and lettered all around. 13 Q. All right. Can you put a star or something 14 where the confinement building was, and then just draw a 15 line to it and label it confinement building. Where are 16 we at? Right here? 17 A. Yes. 18 Q. You can put a line to that and put R. Himself 19 confinement. 20 A. (The witness marked the exhibit.) 21 Q. Okay. Was that building west of your 22 residence? 23 A. Yes. 24 Q. How close was the building to your residence? 25 A. 7-800 feet.</p>	<p style="text-align: right;">51</p> <p>1 Q. No fans? 2 A. No. 3 Q. Okay. 4 A. It was open. 5 Q. Open building. 6 The fields that you applied that manure from 7 the confinement building, were they different from the 8 fields that you indicated earlier? 9 A. No. 10 Q. Who owned the fields around your residence 11 here. You've got your residence up here at the corner of 12 350 and 425, and there's some fields south of that? 13 A. Virgil Hyde. 14 Q. Okay. So, those were not your fields? 15 A. No. 16 Q. When you had the confinement building and 17 about 400 head of hogs, how did the size -- at that time 18 how did the size of your hog farm compare to other hog 19 farms in Hendricks County? 20 A. Small. 21 Q. What was considered a large hog farm at that 22 time? 23 A. I don't know. I would guess maybe 1500 head 24 to 2,000. I don't know. It's hard to judge because you 25 got partnerships and corporations and, you know, I was</p>
<p style="text-align: right;">50</p> <p>1 Q. Did it generate smells? 2 A. Some, but I used chemicals in it. 3 Q. What kind of chemicals? 4 A. I remember it called Wang. 5 Q. Can you spell that? 6 A. No. 7 Q. Okay. Wang like W-A-N-G? 8 A. Wang. 9 Q. Okay. All right. 10 A. Can you spell it? 11 Q. How often would you use that chemical? 12 A. Whatever they recommended at the time. 13 Q. What would you do with the hog manure 14 generated from that confinement building? 15 A. The building was never really all that full, 16 so there was never really that much waste, and I owned a 17 spreader tank with my uncle Lee Himself, and we bought it 18 together because neither one of us used it all that much, 19 and I spread it on the fields with that. 20 Q. How often would you empty the pit? 21 A. Maybe once every six months. Depending upon 22 the season and the weather, how close you were to putting 23 in crops and stuff like that. 24 Q. Did the building have fans? 25 A. No.</p>	<p style="text-align: right;">52</p> <p>1 just an individual. 2 Q. Okay. How -- the confinement building itself 3 though at that time, was that considered a large 4 confinement building, or was it -- 5 A. No. 6 MS. FERRARO: Asked and answered. 7 MR. EMENHISER: I asked him about his farm, 8 not the building. 9 A. You asked me if my hog operation was a 10 smaller, and I still say it was small. 11 Q. Okay. And the building, the building itself, 12 though, would that be considered -- would that have been 13 considered a small confinement building at the time? 14 A. Yes. I think so. 15 Q. Okay. You said the Hendricks County Co-Op 16 owned the hogs there; correct? 17 A. Yes. 18 Q. Any other entities that you had contracts with 19 to raise hogs? 20 A. No. 21 Q. So, during your farming career, as far as 22 raising hogs, you've either owned them yourself, or you 23 raised them for Hendricks County Co-Op? 24 A. Yes. 25 Q. Okay. When you were raising them for the</p>

<p>53</p> <p>1 Hendricks County Co-Op, how did that arrangement work; 2 what input did Hendricks County Co-Op have in your farm? 3 A. Very, very little. Very, very vague. Most of 4 the work was done by the gentleman by the name of Paul 5 Gerth, and it seemed like he come by maybe once every two 6 or three days and look things over, and give me a status 7 report, or when they was ready to sell or anything, give 8 us -- it was -- 9 Q. Did they -- 10 A. It was an agreement between me and him. There 11 was no -- I think the fee come out of the local elevator 12 listing that Pete Himself run. 13 Q. Did they give you basically freedom to run 14 your farm the way that you saw fit? 15 A. Yes. 16 Q. Would you say that the Hendricks County Co-Op 17 had substantial control over your farm at that time? 18 A. No. This was in the very beginning of these 19 things. It was -- I think I ended up being a guinea pig. 20 They learned a lot from me, with me. 21 Q. You said there was a fire. Tell me about the 22 fire. When did it occur? 23 A. I can't give you an exact date. My dad died 24 September the 27th -- September the 23rd, 1983, and I 25 think he was the happiest man on earth when he saw it, as</p>	<p>55</p> <p>1 Q. What did they do? 2 A. Come and got the hogs. 3 Q. Okay. 4 A. My death loss were not very high because the 5 hogs were not very crowded. There wasn't that many that 6 you could watch real close. 7 Q. Would you consider any aspect of your farming 8 operation, your hog farm, to be a nuisance? 9 A. Turned out, yes. 10 Q. Okay. Describe that. 11 A. Conversation with my wife afterwards. You 12 know, she asked me not to do that again and to stay away 13 from it because she felt like it affected her health, and 14 I did not know that. 15 Q. Was that your current wife, Janet, or was it 16 Jean? 17 A. Jean. 18 Q. Did you ever get any complaints from neighbors 19 regarding smell? 20 A. Not that I recall, no. 21 Q. Do you remember or had you ever spoke with the 22 Lannons while you were operating your hog farm? 23 A. Oh, some. 24 Q. Did they complain about hog smells? 25 A. Not that I remember, no.</p>
<p>54</p> <p>1 he termed confinement building loss. It was structure to 2 an old, existing barn. I don't know whether the wiring 3 or the neighbor told me that he saw it, that he -- the 4 fire actually started in the old part of the barn, and he 5 said it was just like an explosion that it went to the 6 complete to the west end. It happened during the night. 7 Q. So, your father was still alive when the fire 8 occurred? 9 A. Yes. 10 Q. Was the fire investigated? 11 A. Yes. 12 Q. Do you know the results of that investigation? 13 A. They found an electric short, Dick Simon did, 14 in the old barn. 15 Q. I forgot to ask you earlier, how often -- when 16 you were applying manure to the fields, how often would 17 you apply the manure? 18 A. I stated earlier it was around -- every six 19 months or so. 20 Q. Every -- okay. 21 A. The best I can remember. You're talking about 22 something that is 34 years ago. 23 Q. How did you -- how did you dispose of dead 24 hogs when you had a hog operation? 25 A. Called National Byproducts.</p>	<p>56</p> <p>1 Q. Was the reason that you stopped farming 2 because your wife, Jean, asked you to? 3 A. That, plus the fact that we just had a 4 devastating loss. The fire. 5 Q. The fire. 6 A. I don't think I raised another hog after that. 7 I know I didn't. 8 Q. How about cattle; did you continue to raise 9 cattle? 10 A. Yes. 11 Q. Where did you raise the cattle at? Is it down 12 -- 13 A. 425, down by Bill Silos. 14 Q. South of your residence? 15 A. Yes. 16 Q. Did you ever raise any cattle up by your 17 residence at all? 18 A. Maybe as the kids were younger, three or four 19 4H calves would be all. Most of the work there was baled 20 hay. 21 Q. Any other animals that you raised up by your 22 residence? 23 A. A donkey. 24 Q. Anything else? 25 A. You're not going to ask what I did with the</p>

<p>93</p> <p>1 Q. When was that built?</p> <p>2 A. I built that in 1960 for my dad.</p> <p>3 Q. What's that used for?</p> <p>4 A. Hay.</p> <p>5 Q. More hay.</p> <p>6 A. Miscellaneous storage.</p> <p>7 Q. Any other buildings?</p> <p>8 A. That's it.</p> <p>9 Q. Okay. Do you currently have any animals on</p> <p>10 your property?</p> <p>11 A. No.</p> <p>12 Q. You said you had a horse there last year?</p> <p>13 A. Year, year-and-a-half ago and it died; 28</p> <p>14 years old or some such thing.</p> <p>15 Q. Were you taking care of the horse or was that</p> <p>16 something that the owner would come?</p> <p>17 A. Owner took care of it.</p> <p>18 Q. When did you move back into that house again?</p> <p>19 A. On -- I think late in the year of 1994.</p> <p>20 Q. Did you purchase the home?</p> <p>21 A. Yes.</p> <p>22 Q. Who did you purchase it from?</p> <p>23 A. The estate. I had purchased the home in 1997</p> <p>24 from the estate. I had purchased it, plus it was also</p> <p>25 partial agreement that the rest of the heirs took the</p>	<p>95</p> <p>1 area; correct?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. When you were growing up, the location</p> <p>4 where the 4/9 Livestock barns are currently located, what</p> <p>5 was that land used for?</p> <p>6 A. Farming.</p> <p>7 Q. Has that land been used for anything other</p> <p>8 than farming during your lifetime?</p> <p>9 A. No.</p> <p>10 Q. Do you know roughly how far the nearest town</p> <p>11 is from your home?</p> <p>12 A. Five-and-a-half miles.</p> <p>13 Q. What is the nearest town?</p> <p>14 A. North Salem.</p> <p>15 Q. Do you know approximately how far the nearest</p> <p>16 residential subdivision is from your home?</p> <p>17 A. Two miles.</p> <p>18 Q. In which direction?</p> <p>19 A. Southeast.</p> <p>20 Q. The land where the 4/9 Livestock barns are</p> <p>21 located; you said that that's been farming land your</p> <p>22 entire life. What type of uses has it been used for?</p> <p>23 A. Well, I'll just say rotating crops, corn,</p> <p>24 soybeans, wheat, oats, probably had a year or two of hay</p> <p>25 in it when old Bill Wilder had it.</p>
<p>94</p> <p>1 rest of the farm, and I took that, plus I paid a little</p> <p>2 bit of mortgage on it.</p> <p>3 Q. How much did you essentially pay for the home,</p> <p>4 for the acreage that you have there?</p> <p>5 A. Around \$80,000, but that was before the one</p> <p>6 barn was built.</p> <p>7 Q. In 1997, how many acres were you acquiring?</p> <p>8 A. 26.7.</p> <p>9 Q. Was there any other land around the home that</p> <p>10 you acquired at that time?</p> <p>11 A. No.</p> <p>12 Q. Do you have any pets?</p> <p>13 A. Beg your pardon?</p> <p>14 Q. Do you have any pets?</p> <p>15 A. One, two cats.</p> <p>16 Q. Two cats. Are they indoor animals?</p> <p>17 A. No.</p> <p>18 Q. Okay. Barn cats?</p> <p>19 A. Nuisance cats.</p> <p>20 You got to have cats. That will keep the mice</p> <p>21 down.</p> <p>22 Q. I'll have you take a look at Exhibit 6 again,</p> <p>23 okay. Can you pull that out. That's the map.</p> <p>24 Mr. Himself, you've essentially spent your</p> <p>25 entire life -- you've lived your entire life out in this</p>	<p>96</p> <p>1 Q. How far is the 4/9 barns from your current</p> <p>2 residence?</p> <p>3 A. 1600 feet.</p> <p>4 Q. How did you determine that?</p> <p>5 A. County map.</p> <p>6 Q. Can you see their -- the barns from your</p> <p>7 house?</p> <p>8 A. Yes.</p> <p>9 Q. Do you know what -- are there any fields</p> <p>10 surrounding your property that 4/9 uses to land-apply</p> <p>11 manure?</p> <p>12 A. No.</p> <p>13 Q. There are no fields around your house that</p> <p>14 they use --</p> <p>15 A. Not around my house, but they are within just</p> <p>16 a few feet. Property line.</p> <p>17 Q. Okay. Well, are -- let me ask it this way:</p> <p>18 On this map, are there any fields -- can you identify any</p> <p>19 fields where 4/9 applies manure?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Why don't you do that for me. Why</p> <p>22 don't you either draw a square around them or circle</p> <p>23 them, and mark them with 4/9 application.</p> <p>24 A. (The witness marked the exhibit.) That's the</p> <p>25 best I can determine.</p>

<p>101</p> <p>1 the Hardens applying manure to that property?</p> <p>2 A. No.</p> <p>3 Q. Why is that?</p> <p>4 A. Good operators.</p> <p>5 Q. Is it because they knife the manure in?</p> <p>6 A. Yes.</p> <p>7 Q. You would agree that knifing manure in</p> <p>8 eliminates or reduces the smell of the manure?</p> <p>9 A. If it's covered good, I would assume.</p> <p>10 Q. How about back when you owned the residence up</p> <p>11 by 350 and 425, did you lease any property up there to</p> <p>12 any farmers ever?</p> <p>13 A. No.</p> <p>14 Q. Okay. So, the only farmers that you ever</p> <p>15 leased any land to are the Hardens?</p> <p>16 A. Yes.</p> <p>17 Q. Have you ever sold any land that you owned to</p> <p>18 a farmer?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. Who did you sell to?</p> <p>21 A. Harden.</p> <p>22 Q. Okay. Which one?</p> <p>23 A. John.</p> <p>24 Q. Is there a John Jr. and a John Sr.?</p> <p>25 A. I think John Sr. is dead.</p>	<p>103</p> <p>1 can't remember his name.</p> <p>2 Q. Do you recall what the appraised value was at</p> <p>3 that time?</p> <p>4 A. I cannot.</p> <p>5 Q. Do you recall selling it for approximately the</p> <p>6 price that it appraised for?</p> <p>7 A. Yes.</p> <p>8 Q. Back to the leasing of the property to the</p> <p>9 Hardens. How much do you receive from the Hardens per</p> <p>10 acre?</p> <p>11 A. I think it's around \$100 an acre because it's</p> <p>12 cut up. That was my -- that was my goal was to -- hoping</p> <p>13 they would improve it, which they have. They've -- the</p> <p>14 only agreement I had with John Harden was respect me, and</p> <p>15 he's done that very well.</p> <p>16 Q. How did you determine the \$100-per-acre price?</p> <p>17 A. I felt like at that time that was probably</p> <p>18 below what the going rate was; but for what I had, that</p> <p>19 was probably sufficient because it was cut up, meaning he</p> <p>20 had to move around.</p> <p>21 Q. Yeah.</p> <p>22 A. If wasn't all one big area.</p> <p>23 Q. Did you have -- did you have an appraisal done</p> <p>24 at that time to give you a sense of what the value was?</p> <p>25 A. I probably asked around, a farmer or two, what</p>
<p>102</p> <p>1 Q. Okay. When did you sell the farm -- land to</p> <p>2 the Hardens?</p> <p>3 A. Around 2000.</p> <p>4 Q. What land did you sell to them?</p> <p>5 A. Oh, the -- basically the 132 acres around my</p> <p>6 farm.</p> <p>7 Q. To the west of your farm?</p> <p>8 A. To the west, to the south, and to the east.</p> <p>9 Q. Okay. Is that some of the land that they're</p> <p>10 leasing from you now, or --</p> <p>11 A. No, I -- the only ground they're leasing from</p> <p>12 me is ground that I own.</p> <p>13 Q. Okay. How many acres did you sell?</p> <p>14 A. 132.</p> <p>15 Q. How much did you receive for that?</p> <p>16 A. I don't remember. I sold it because I had</p> <p>17 bought it from the estate, and I had a high interest</p> <p>18 rate, and it just wasn't going to pay off for me.</p> <p>19 So, we sold the ground and basically just</p> <p>20 recovered expenses of selling it. Get out from under it.</p> <p>21 Q. Did you have the ground appraised before you</p> <p>22 sold it?</p> <p>23 A. I'm sure we did.</p> <p>24 Q. Do you recall who appraised it for you?</p> <p>25 A. A professional appraiser out of Lafayette. I</p>	<p>104</p> <p>1 he paid for ground; but, you know, basically it.</p> <p>2 Q. When you sold the farmland to John Harden, did</p> <p>3 you put any restrictions on how he could use it?</p> <p>4 A. No.</p> <p>5 Q. Is that the land that he's applied manure to</p> <p>6 that you were referencing earlier?</p> <p>7 A. Yes.</p> <p>8 (Deposition Exhibit 13, Warranty deed, was marked for</p> <p>9 identification.)</p> <p>10 Q. You've been handed Deposition Exhibit No. 13.</p> <p>11 Could you take a look at that. It appears to be a</p> <p>12 warranty deed that's dated around January of 1992. Do</p> <p>13 you see that?</p> <p>14 A. No.</p> <p>15 Q. Okay. If you look at -- if you look down here</p> <p>16 at the bottom where it says, "In witness where" -- about</p> <p>17 the middle. It says, "In witness wherefore grantor has</p> <p>18 executed this 30th day of January, 1992." Do you see</p> <p>19 that?</p> <p>20 A. I don't have any idea what this is.</p> <p>21 Q. Well, that's what I was going to ask you.</p> <p>22 It appears to be a warranty deed from -- you</p> <p>23 are Martin Richard Himself?</p> <p>24 A. Oh, yeah. I remember now.</p> <p>25 Q. Okay. Tell me what this is.</p>

<p>121</p> <p>1 Q. I apologize. I don't mean to be rude. If we 2 speak over each other, it's going to make for a muddled 3 transcript; so if I can finish, that would be best, and 4 I'll try to let you finish, and if I'm not letting you 5 finish, I'm sure your counsel will let me know. 6 (Deposition Exhibit 19, amendment to listing contract, 7 was marked for identification.) 8 Q. All right. Let's mark this as 19. 9 Before we get into 19, let me ask you this: 10 Is your home currently listed for sale? 11 A. No. 12 Q. It's not? Is there a sign out -- or has there 13 been a sign out recently listing your home for sale? 14 A. No. 15 Q. Okay. Are you intending on selling your home 16 anytime soon? 17 A. No. 18 Q. Why not? 19 A. Never thought about it. 20 Q. Okay. All right. 21 Exhibit No. 19 -- 22 A. Well, why you ask me a question like that, why 23 not? 24 Q. Well, I -- I get to ask the questions. 25 Exhibit No. 19 is titled amendment to listing</p>	<p>123</p> <p>1 questioning you, you had mentioned that you thought your 2 property was worth -- well, the line of questioning was, 3 has the value of your property decreased. You said the 4 value has decreased tremendously. You were asked how 5 much and you said over \$400,000. 6 Do you believe that your property was worth 7 \$400,000 at any point in time? 8 A. Yes, I do. 9 Q. Okay. How do you -- what do you base that on? 10 A. Previous appraisal done by another company, 11 and they appraised it at \$407,000, and since then, it -- 12 I believe that there's a value in dividing the property 13 into three different pieces of property that would make 14 it more valuable. That's what I based that upon. 15 Not many people can get financing for 26.7 16 acres. 17 Q. So, you said a previous appraisal done by 18 another company. 19 When was this appraisal done? 20 A. Around 2005, 2006. 21 Q. Who was the company? 22 A. It was through C.M. Bottama. 23 Q. Was it appraised at \$407,000 for three 24 separate parcels? 25 A. No, one parcel divided together. And I think</p>
<p>122</p> <p>1 contract. Do you see that? 2 A. Yes. 3 Q. Okay. The date on that is July 8, 2013. And 4 then it says, "This amendment is attached to and made a 5 part of listing contract dated May 3, 2013." I'm sorry. 6 I said -- yeah, May 3, 2013. 7 Did you have your property listed at any time 8 prior to May of 2013? 9 A. No. 10 Q. Okay. When did this listing contract run out? 11 A. Apparently last fall sometime -- or 2013 in 12 the fall. 13 Q. Okay. Okay. Why do you say that? 14 A. Because he come to me and said there's no way 15 I can sell the property. 16 Q. You said he. That's -- who is that? 17 A. Pat Plough. 18 Q. So, it says on line 10, listing price changed 19 from 320 to 300,000. 20 First of all, how did you come to the \$320,000 21 number? 22 A. I'm sure that's what the Realtor told me at 23 that time, you know, with the hog barns going in, that 24 hopefully we could get it sold and get out of there. 25 Q. Okay. I think earlier today when Mr. Park was</p>	<p>124</p> <p>1 the only reason we did that is because I said that I 2 should have said at that time and used my head. You 3 know, in the last year or two years ago, when I was 4 talking to people, they said, well, there's no way they 5 could get a mortgage for that kind of property and that, 6 you know, the best thing to do is to divide it, and you 7 know, I know there's two or three different places there 8 where it could be divided, and be more valuable. 9 Q. If it would be divided, would those separate 10 parcels be -- how is it zoned? Is it zoned... 11 A. I assume it's zoned agricultural residential. 12 I have no idea. 13 Q. Okay. 14 A. I just don't get into that part of it. 15 Q. When you had the appraisal done in 2005-2006, 16 what was the purpose of the appraisal; why did you have 17 it done? 18 A. Just to see what the value of it was at that 19 time. Things were pretty -- were going pretty good at 20 that time, and land prices were up, and we decided not to 21 sell. 22 Q. How are land prices for farmland in Hendricks 23 County now compared to what they were back in 2005-2006 24 when the appraisal was done? 25 A. I would think they're up, but I haven't got</p>

<p>133</p> <p>1 it?</p> <p>2 A. I don't -- I -- we might have read it to her,</p> <p>3 but I don't really think that I heard anything from her</p> <p>4 about it.</p> <p>5 Q. Did you draft this letter?</p> <p>6 A. Janet and I did.</p> <p>7 Q. Okay. Did you have any help?</p> <p>8 A. No.</p> <p>9 Q. Okay. The letter was sent on January 20,</p> <p>10 2015, or it's dated that; correct?</p> <p>11 A. Right.</p> <p>12 Q. Why did you send the letter -- this letter at</p> <p>13 that time?</p> <p>14 A. Because I felt like we needed to tell them our</p> <p>15 problems and ask them to cease operation.</p> <p>16 Q. If you look at the second paragraph, the first</p> <p>17 sentence there -- or I'm sorry, the second sentence, it</p> <p>18 says, "Because of your hog operation, Janet and I are now</p> <p>19 constantly coughing and have sore throats."</p> <p>20 Have you seen a physician for that?</p> <p>21 A. No.</p> <p>22 Q. We'll get into it tomorrow, but I'll ask you</p> <p>23 anyways; has Janet seen a physician for that?</p> <p>24 A. Yes. I think she did.</p> <p>25 Q. What physician?</p>	<p>135</p> <p>1 2013.</p> <p>2 Q. You said earlier that she comes back, sounds</p> <p>3 like, on the weekends, Friday evening through Sunday</p> <p>4 evening. How long has she been doing that?</p> <p>5 A. Well, it's not consistent. Depends on what's</p> <p>6 going on at the house or what we got going on someplace</p> <p>7 else. We have an extremely large family, and you know,</p> <p>8 we do try to keep up visiting them since they can't visit</p> <p>9 us; so, you know, I would say it's fairly consistently.</p> <p>10 Q. Okay. Do you recall the approximate time</p> <p>11 frame that her doctor -- was it Dr. Jones that advised</p> <p>12 her to limit her exposure?</p> <p>13 A. That's what she told me.</p> <p>14 Q. Do you recall the time frame when this</p> <p>15 occurred?</p> <p>16 A. I would say it was right around -- a little</p> <p>17 before this.</p> <p>18 Q. By this --</p> <p>19 A. I would say, you know, I think it was very</p> <p>20 close to the time that the operation went into effect and</p> <p>21 she started --</p> <p>22 Q. Okay.</p> <p>23 A. -- you know, started having problems, and I</p> <p>24 can recall her saying to me that you cannot survive under</p> <p>25 these conditions, is what she told me.</p>
<p>134</p> <p>1 A. Dr. Jones.</p> <p>2 MS. FERRARO: And I'm just going to object</p> <p>3 as to relevance. We haven't raised a claim for medical</p> <p>4 injuries in this case.</p> <p>5 Q. Mr. Himself, are you planning to make any</p> <p>6 claims for medical expenses or personal injury related to</p> <p>7 the 4/9 hog farm?</p> <p>8 A. I don't know.</p> <p>9 Q. Well, your counsel says that you haven't</p> <p>10 raised them to date; is that your understanding?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. Do you have any intention of raising</p> <p>13 them?</p> <p>14 A. I just -- I know I'm not healthy. I don't</p> <p>15 know.</p> <p>16 Q. Where's Dr. Jones located at?</p> <p>17 A. Danville Community -- Hendricks County</p> <p>18 Community Hospital.</p> <p>19 Q. Okay. In the next sentence it says, "It's so</p> <p>20 bad she had to move out."</p> <p>21 When did Janet move out?</p> <p>22 A. I think it was within a few days after we</p> <p>23 started smelling the hogs.</p> <p>24 Q. Well, when did you start smelling the hogs?</p> <p>25 A. Seems like it was the first week in October of</p>	<p>136</p> <p>1 Q. She told you that you could not survive under</p> <p>2 those conditions?</p> <p>3 A. Dr. Jones told her that you cannot survive</p> <p>4 under these conditions.</p> <p>5 Q. In the third paragraph, it says, that "We've</p> <p>6 listed our property."</p> <p>7 Do you see that? It's the second line in the</p> <p>8 third paragraph.</p> <p>9 A. Yes.</p> <p>10 Q. Is that -- tell me who that is that you listed</p> <p>11 with?</p> <p>12 A. That was listed with a guy by the name of Pat</p> <p>13 Plough from Brownsburg.</p> <p>14 Q. Okay. Was the property listed -- I'm a little</p> <p>15 unclear. Was the property listed around the date of this</p> <p>16 letter as well?</p> <p>17 A. The property was listed in 2013.</p> <p>18 Q. Okay. At the time of this letter was the</p> <p>19 property listed?</p> <p>20 A. No.</p> <p>21 Q. Same line. You refer to it as a hog factory.</p> <p>22 Why do you call it a hog factory?</p> <p>23 A. Because that's what it is.</p> <p>24 Q. Okay. Well, when does a farm become a</p> <p>25 factory, in your opinion?</p>

<p style="text-align: right;">245</p> <p>1 keep referring to, that was involved in that, was never 2 there. That was nothing to do with that. You're talking 3 about something that happened almost 40 years ago. 4 Q. The Hendricks County Co-Op's ownership of the 5 hogs on your farm didn't constitute substantial control 6 of your farm; correct? 7 A. I don't think so, no. 8 Q. Okay. Do you have any firsthand knowledge of 9 the arrangement between Co-Alliance and 4/9 Livestock? 10 A. Only what they produced for us, which says 11 they own the hogs and provide the feed, and that's it. 12 Q. Do you consider the 4/9 farm to be a nuisance? 13 MS. FERRARO: Objection. Calls for a legal 14 conclusion. You can answer to the extent you understand 15 that question. 16 A. What do you -- what's the definition of 17 nuisance? 18 Q. Well, okay. We'll break this down. 19 Has the 4/9 farm impacted your health in any 20 way? 21 MS. FERRARO: Objection. Calls for a 22 medical opinion. 23 Q. Your counsel didn't instruct you not to answer 24 the question, so you're free to answer the question. 25 A. I think it has.</p>	<p style="text-align: right;">247</p> <p>1 A. No. 2 Q. Any diagnosis as to why you're not sleeping 3 good? 4 A. Stress. 5 Q. Has the 4/9 CAFO destructed your use of the 6 property? 7 A. Yes. 8 Q. How so? 9 A. None of the grandkids want to come and play 10 there because of the smell. We don't get to sit outside 11 on our patios or anything anymore. As a matter of fact, 12 we finally just sold the furniture. 13 Q. Which grandkids no longer come? 14 A. One of them come last summer, and him and his 15 mother stayed a half hour. He went to his mommy and 16 said, "I can't stand this smell," and my daughter said, 17 "I'm sorry, Dad, but we're going to leave and go stay 18 with Mom." And never come back out. 19 Q. Which child was that? 20 A. Hugo. 21 Q. Is that the name of the grandchild? 22 A. Yes. 23 Q. Okay. Is that -- is Hugo -- which one of your 24 children is Hugo a child of? 25 A. Angela.</p>
<p style="text-align: right;">246</p> <p>1 Q. Okay. Describe that. 2 A. I don't feel good. I don't sleep good. My 3 eyes burn all the time when I'm outside around it. 4 Q. Have you seen a physician for these things? 5 A. I had. 6 Q. What's the name of the physician? 7 A. Dr. Lovall. 8 Q. Spell that for me. 9 A. L-O-V-A-L-L. 10 Q. Where is Dr. Lovall located? 11 A. Danville. 12 Q. When did you see Dr. Lovall for this; is he 13 your family physician? 14 A. Yes. 15 Q. Primary care physician? 16 A. Yes. 17 Q. When did you see him for these things? 18 A. The last time was three weeks ago, and I got 19 an appointment next week with him. 20 Q. Has Dr. Lovall ever said that any of your 21 conditions are directly related to the 4/9 CAFO? 22 A. No, but he looks on records that says, when 23 did this come about. 24 Q. Have you had any diagnosis from Dr. Lovall 25 that says why your eyes are burning?</p>	<p style="text-align: right;">248</p> <p>1 Q. Any other grandkids that have come out and 2 refused to stay? 3 A. Yes. 4 Q. Okay. Tell me about that. 5 A. Son, Richard, from Lima, Ohio. 6 Q. When did that occur? 7 A. That occurred in the early part of '14. The 8 two children -- they stayed maybe two hours and they 9 said, we just got to go, Hon. And they left. 10 Q. Any other instances where your grandkids or 11 your children would leave? 12 A. That's the main ones. The oldest boys left, 13 they tell you, too, because of the smell and he was 14 usually in a hurry anyway, because he come Sunday 15 afternoon and he had to get back to Fort Wayne; so, it 16 was a combination of things. 17 Q. How often would your children visit you in -- 18 let's say, 2012, prior to the construction of the farm? 19 A. Four or five times a year. The oldest boy, 20 maybe eight or nine. 21 Q. Who would visit you four or five times per 22 year? 23 A. Angela and Richard. 24 Q. Your oldest would visit approximately eight 25 times?</p>

<p>261</p> <p>1 A. I think there is, but I don't know.</p> <p>2 Q. Okay.</p> <p>3 A. I've heard that the marginal of income, it's</p> <p>4 expensive, but I don't know.</p> <p>5 Q. Do you know the names of any products?</p> <p>6 A. Wang. No.</p> <p>7 Q. Other than Wang.</p> <p>8 A. No, I do not.</p> <p>9 Q. When 4/9 has land-applied its manure, has any</p> <p>10 of that manure migrated onto your property?</p> <p>11 A. I don't know. I don't think so.</p> <p>12 Q. All right. Your complaint asserts a claim for</p> <p>13 trespass, and I'm curious as to what you believe has</p> <p>14 trespassed onto your property?</p> <p>15 MS. FERRARO: Objection. Calls for a legal</p> <p>16 conclusion. You can answer to the extent that you know.</p> <p>17 A. I don't know. The smell.</p> <p>18 Q. Anything other than the smell that's</p> <p>19 trespassed onto your property?</p> <p>20 A. Foul, unfresh air, but they go together.</p> <p>21 Q. Okay. You're not claiming that any manure has</p> <p>22 trespassed onto your property?</p> <p>23 A. No.</p> <p>24 Q. Okay. What's the damage that you claim has</p> <p>25 been caused by the trespass?</p>	<p>263</p> <p>1 MR. EMENHISER: If we wanted to wrap this</p> <p>2 up at 5:00, this might be a good breaking point.</p> <p>3 MS. FERRARO: Okay. Sounds good.</p> <p>4 MR. EMENHISER: Okay?</p> <p>5 MS. FERRARO: Yes.</p> <p>6 THE VIDEOGRAPHER: This ends volume one of</p> <p>7 the deposition of Martin Richard Himself. We are off the</p> <p>8 record. The time is 4:48 p.m.</p> <p>9 (RECESS, 4:48 p.m.)</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>262</p> <p>1 MS. FERRARO: Objection. Legal conclusion,</p> <p>2 but you can answer.</p> <p>3 A. The smell is the big thing.</p> <p>4 Q. Okay. Is it anything different than the</p> <p>5 enjoyment of your property?</p> <p>6 MS. FERRARO: Other than what he has</p> <p>7 testified to? He testified about not being able to sleep</p> <p>8 at night.</p> <p>9 MR. EMENHISER: Counsel, do you have an</p> <p>10 objection?</p> <p>11 MS. FERRARO: Yes. Asked and answered, and</p> <p>12 misleading question.</p> <p>13 MR. EMENHISER: Let me rephrase my</p> <p>14 question.</p> <p>15 BY MR. EMENHISER:</p> <p>16 Q. Is there anything different, or other than the</p> <p>17 smell, that you claim has trespassed onto your property?</p> <p>18 MS. FERRARO: Asked and answered. You can</p> <p>19 answer again.</p> <p>20 A. Again, no.</p> <p>21 Q. Okay.</p> <p>22 MR. EMENHISER: It is 4:50. I'm at a point</p> <p>23 where I got a little bit to go yet, but I know you've got</p> <p>24 some. I'm getting into a new section. So --</p> <p>25 MS. FERRARO: Okay.</p>	<p>264</p> <p>1 CERTIFICATE OF COURT REPORTER</p> <p>2 I, Marjorie Peters, Registered Merit Reporter,</p> <p>3 Certified Realtime Reporter, before whom the foregoing</p> <p>4 deposition was taken, do hereby certify that the witness</p> <p>5 was placed under oath according to the law; that the</p> <p>6 foregoing transcript is a true and correct record of the</p> <p>7 testimony given; that said testimony was taken by me</p> <p>8 stenographically and thereafter reduced to typewriting</p> <p>9 under my direction and that I am neither counsel for,</p> <p>10 related to, nor employed by any of the parties to this</p> <p>11 case and have no interest, financial or otherwise, in its</p> <p>12 outcome.</p> <p>13 I further certify that signature was not</p> <p>14 waived by the witness.</p> <p>15 I, Joanne Connor, Notary Public in the State</p> <p>16 of Indiana, do hereby certify that the witness was placed</p> <p>17 under oath according to the law.</p> <p>18 IN WITNESS WHEREOF, I have hereunto set my</p> <p>19 hand and affixed my seal this day of , 2016.</p> <p>20 <i>Marjorie Peters</i></p> <p>21 Marjorie Peters, RMR, CRR</p> <p>22 Court Reporter</p> <p>23</p> <p>24</p> <p>25 Joanne Connor Notary Public</p>

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1 MR. EMENHISER: If we wanted to wrap this
2 up at 5:00, this might be a good breaking point.

3 MS. FERRARO: Okay. Sounds good.

4 MR. EMENHISER: Okay?

5 MS. FERRARO: Yes.

6 THE VIDEOGRAPHER: This ends volume one of
7 the deposition of Martin Richard Himself. We are off the
8 record. The time is 4:48 p.m.

9 (RECESS, 4:48 p.m.)

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X Martin Richard Himself

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In the Matter Of:

MARTIN RICHARD HIMSEL, ET AL.

-VS-

SAMUEL HIMSEL, ET AL.

MARTIN RICHARD HIMSEL, VOL. II

May 19, 2016



CONNOR REPORTING

111 Monument Circle, Suite 4350

Indianapolis, IN 46204

Phone: 317-236-6022

Fax: 317-236-6015

Toll Free: 800-554-3376

<p>1 STATE OF INDIANA) IN THE HENDRICKS SUPERIOR COURT 2)SS: 3 HENDRICKS COUNTY) CAUSE NO. 32D04-1510-PL-000150 4 5 MARTIN RICHARD HIMSEL, JANET L.) 6 HIMSEL, ROBERT J. LANNON and) 7 SUSAN M. LANNON,) 8) 9 Plaintiffs,) 10 vs.) 11) 12 SAMUEL T. HIMSEL, CORY M. HIMSEL,) 13 CLINTON S. HIMSEL, 4/9 LIVESTOCK,) 14 LLC, and CO-ALLIANCE, LLP,) 15 Defendant.) 16 17 - - - - - 18 19 VIDEOTAPED DEPOSITION OF MARTIN RICHARD HIMSEL 20 21 VOLUME TWO 22 23 Thursday, May 19, 2016, 9:16 a.m. 24 25 Harrington Law, PC 105 North Washington Street Danville, Indiana</p>	<p>268</p> <p>1 COUNSEL PRESENT: 2 For the Attorney General of Indiana: 3 Brian L. Park, Esquire 4 OFFICE OF INDIANA ATTORNEY GENERAL 5 302 West Washington Street 6 Indianapolis, IN 46204-770 7 brian.park@atg.in.gov 8 ALSO PRESENT: 9 Joanne Connor, videographer 10 11 I N D E X 12 13 EXAMINATION PAGE 14 MARTIN RICHARD HIMSEL 15 BY MR. EMENHISER 269 16 BY MS. FERRARO 311 17 BY MR. EMENHISER 351 18 19 DEPOSITION EXHIBIT DESCRIPTION PAGE 20 Exhibit 41 - Konter email, 3.19.2013 287 21 Exhibit 42 - email, Konter Response 10 290 22 Exhibit 43 - email, Konter Response 17 292 23 Exhibit 44 - email, Konter Response 18 294 24 Exhibit 45 - email, Konter Response 21 295 25 Exhibit 46 - email, Konter Response 30 297 26 Exhibit 47 - email, Konter Response 80 305 27 Exhibit 48 - email, Konter Response 83 308 28 Exhibit 49 - Hendricks County Zoning Ordinance, 320 29 10.1.08</p>
<p>267</p> <p>1 VIDEOTAPED DEPOSITION OF MARTIN RICHARD HIMSEL, 2 a witness herein, called by the Defendants for 3 examination, taken pursuant to the Indiana Rules of Trial 4 Procedure, by and before Marjorie Peters, a Registered 5 Merit Reporter, Certified Realtime Reporter and Joanne 6 Connor, Notary Public in and for the State of Indiana, at 7 Harrington Law, PC, 105 North Washington Street, 8 Danville, Indiana, on Thursday, May 19, 2016, at 9 9:16 a.m. 10 COUNSEL PRESENT: 11 For the Plaintiff: 12 Kim E. Ferraro, Esquire 13 Jordan Anne Chelovich, Esquire 14 HOOSIER ENVIRONMENTAL COUNCIL 15 407 E. Lincolnway 16 Suite A 17 Valparaiso, IN 46383 18 kferraro@hecweb.org 19 For the Defendants Samuel T. Himself, Cory M. Himself, 20 Clinton S. Himself, 4/9 Livestock, LLC, and Co-Alliance, 21 LLP: 22 Jonathan P. Emehiser, Esquire 23 PLEWS SHADLEY RACHER & BRAUN LLP 24 1346 North Delaware Street 25 Indianapolis, IN 46202 jemenhiser@psrb.com For the Defendant Samuel T. Himself: Brandon W. Ehrie, Esquire LEWIS WAGNER LLP 501 Indiana Avenue Suite 200 Indianapolis IN 46202-6150 behrie@lewiswagner.com</p>	<p>269</p> <p>1 PROCEEDINGS 2 THE VIDEOGRAPHER: This begins disk number 3 one, volume two, of the video deposition of Martin 4 Richard Himself taken in the case of Martin Richard 5 Himself, et al. versus Samuel Himself, et al. Today's date 6 is May 19, 2016 and the local time is 9:16 a.m. 7 Mr. Himself, would you raise your right 8 hand, please. 9 MARTIN RICHARD HIMSELF, 10 a witness, having been first duly sworn, was examined and 11 testified as follows: 12 EXAMINATION 13 BY MR. EMENHISER: 14 Q. Mr. Himself, thank you for coming back. I want 15 to get right into it. With regard to the 4/9 farm, are 16 there -- other than the smell, is there anything else 17 that you find objectionable that you attribute to the 4/9 18 farm? 19 A. Yes. 20 MS. FERRARO: I'm just going to object to 21 the extent that this question has been asked and 22 answered. You may again answer. 23 Q. Tell me -- tell me, in addition to the smell, 24 what else you find objectionable from the 4/9 farm? 25 A. To me, personally, it causes tremendous eye</p>

<p style="text-align: right;">270</p> <p>1 irritation. I go back and have drops put in my eyes that 2 my eye doctor had given me. It just won't go away. It 3 takes some time for that to happen. Usually, I end up 4 stopping what I'm doing and going back into the house to 5 try to get relief for my eyes. 6 I have experienced some headache and nausea 7 from it. Just a constant -- constant smell of whatever 8 those ingredients that we've covered within the testimony 9 yesterday causes me just headache, nausea if I stay out 10 for a long period of time. 11 Just after a while, you just -- you just 12 constantly -- it gets on the nostrils of your nose. You 13 go -- I have to usually end up going into the house. And 14 before I can get any relief, I have to take a rag and 15 wash off my nostrils and my nose. I have done that many, 16 many, many, many times. 17 When I mow my grass, I do wear a mask over my 18 face so I can -- I have a very large yard that I'm very 19 proud of, and up until this year kept very well 20 manicured, and I just have to stay with it to get it done 21 and try to work through the best I can. 22 Q. Other than the items that you've identified 23 there as well as the smell, anything else from the 4/9 24 farm that you find objectionable? 25 A. The whole thing objectionable -- you know,</p>	<p style="text-align: right;">272</p> <p>1 obstructed the use of your property? 2 A. No. 3 Q. Were there -- prior to the construction of the 4 hog barns, were there any conditions on that property 5 that interfered with your property or your style of 6 living? 7 A. No. 8 Q. If you could take out -- well, before I have 9 you look at Exhibit 39, let me ask you this: And you 10 don't need to identify them by name, but can you tell me, 11 have you retained any experts or consulted with any 12 experts in this case? 13 A. Not yet. 14 Q. If you would take out Exhibit No. 39. They're 15 right here, and I think they're in order. 16 Thank you. If you could turn to numbered 17 paragraph 34, Mr. Himself. Let me know when you're there. 18 Paragraph 34 starts out, "The defendants' unreasonable 19 conduct," and that's what I want to ask you about. Do 20 you have any examples of what you would consider 21 unreasonable conduct by Sam Himself? 22 MS. FERRARO: I'm just going to object to 23 the extent that calls for a legal conclusion, but you can 24 answer to your lay understanding. 25 A. The only thing I would say is unreasonable</p>
<p style="text-align: right;">271</p> <p>1 causes me stress constantly. When you smell it, you 2 constantly wonder what's going to happen to you, what's 3 going to happen to your property that you all this time 4 had used as probably a retirement plan. 5 You hear many cases of people saying, you 6 don't have a chance. They're going to win over you. 7 They're big money. You know, you just -- you have to 8 have that constant fight in you to continue. 9 Q. Okay. Mr. Himself, prior to the construction 10 of the hog barns at the 4/9 farm, that land was used for 11 growing crops as far back as you can remember, correct? 12 Your entire life, in fact, right? 13 A. Yes. 14 Q. Okay. And prior to the construction of the 15 hog barns on that property, were there any conditions on 16 that property that were causing any injuries to your 17 health? 18 A. No. 19 Q. Okay. Prior to the construction of the hog 20 barns, were there any conditions on that property where 21 the 4/9 barns are now located that you considered 22 indecent or offensive to your senses? 23 A. No. 24 Q. Okay. Prior to the construction of the hog 25 barns, were there any conditions on the property that</p>	<p style="text-align: right;">273</p> <p>1 conduct is he picked a very poor location to build his 2 hog factory. 3 Q. Okay. Do you have any examples of 4 unreasonable -- what you would consider unreasonable 5 conduct by Cory Himself? 6 MS. FERRARO: Same objection. Calls for a 7 legal conclusion. You can answer. 8 A. I basically think it's the same answer. 9 Q. Okay. Do you have any examples of 10 unreasonable -- what you would consider unreasonable 11 conduct by Clinton Himself? 12 MS. FERRARO: Same objection. Calls for a 13 legal conclusion. 14 A. Same as the other two. 15 Q. Okay. With regard to Co-Alliance, who is also 16 a defendant in this case, what would you consider to be 17 unreasonable conduct on the part of Co-Alliance? 18 MS. FERRARO: Same objection. Calls for a 19 legal conclusion. 20 A. I read a paragraph in the letter that he wrote 21 that was accompanied with the application, and I didn't 22 think he was completely right -- I know he wasn't -- when 23 he mentioned that there was no homes within a half a mile 24 of his facilities, when in my opinion, there's nine. 25 So, I...</p>

<p style="text-align: right;">274</p> <p>1 Q. In your answer there, you referenced "he." Do</p> <p>2 you know the name of the person that you're talking</p> <p>3 about?</p> <p>4 A. Kevin Still.</p> <p>5 Q. Any other examples of conduct by Co-Alliance</p> <p>6 that you would consider unreasonable?</p> <p>7 MS. FERRARO: Continuing objection. Calls</p> <p>8 for a legal conclusion.</p> <p>9 A. Not at this time.</p> <p>10 Q. Okay. Mr. Himself, do you believe that the</p> <p>11 defendants are operating the 4/9 farm in an illegal</p> <p>12 manner?</p> <p>13 MS. FERRARO: Objection. Calls for a legal</p> <p>14 conclusion. You can answer.</p> <p>15 A. I have no idea.</p> <p>16 Q. Mr. Himself, do you have a belief as to whether</p> <p>17 the defendants are operating the farm in a careless or</p> <p>18 irresponsible manner?</p> <p>19 MS. FERRARO: Calls for a legal conclusion.</p> <p>20 You can answer.</p> <p>21 A. I have no idea.</p> <p>22 Q. Do you have any firsthand knowledge that the</p> <p>23 farm -- 4/9 farm has done anything illegal?</p> <p>24 MS. FERRARO: Asked and answered and calls</p> <p>25 for a legal conclusion.</p>	<p style="text-align: right;">276</p> <p>1 A. That Sam took alcoholic beverages into high</p> <p>2 school activities.</p> <p>3 Q. Did that have anything to do with the</p> <p>4 operation of the 4/9 farm?</p> <p>5 A. That's not what you asked me.</p> <p>6 Q. Do you have any firsthand knowledge that any</p> <p>7 of the individual Himself defendants, Sam, Cory or</p> <p>8 Clinton, have done anything illegal with regard to the</p> <p>9 operation of the farm?</p> <p>10 A. You did not --</p> <p>11 MS. FERRARO: Objection. Calls for a legal</p> <p>12 conclusion. Asked and answered.</p> <p>13 MR. EMENHISER: Well --</p> <p>14 MS. FERRARO: You may answer.</p> <p>15 THE WITNESS: That's not what you asked me.</p> <p>16 BY MR. EMENHISER:</p> <p>17 Q. I've now asked you that question. If you</p> <p>18 would like me to repeat it again, I will.</p> <p>19 A. Yes. I don't.</p> <p>20 Q. You don't have any firsthand knowledge?</p> <p>21 A. I stay completely away from anything they do,</p> <p>22 so I don't know.</p> <p>23 Q. Do you have any firsthand knowledge that</p> <p>24 Co-Alliance has done something illegal with regard to the</p> <p>25 operation of the hog farm?</p>
<p style="text-align: right;">275</p> <p>1 A. I have no idea.</p> <p>2 Q. Does that mean you have no firsthand knowledge</p> <p>3 that the farm has done something illegal?</p> <p>4 A. No.</p> <p>5 Q. That was a poor question. When you said no --</p> <p>6 A. I --</p> <p>7 Q. Let me just restate the question.</p> <p>8 Do you have any firsthand knowledge that the</p> <p>9 farm has done something illegal?</p> <p>10 MS. FERRARO: Same objection.</p> <p>11 A. No.</p> <p>12 Q. Do you have any firsthand knowledge that any</p> <p>13 of the individual Himself defendants have done anything</p> <p>14 illegal?</p> <p>15 MS. FERRARO: Asked and answered. Calls</p> <p>16 for a legal conclusion.</p> <p>17 A. Restate the question.</p> <p>18 Q. I'll read it.</p> <p>19 Do you have any firsthand knowledge that any</p> <p>20 of the individual Himself defendants -- and by that, I</p> <p>21 mean either, Sam, Cory, or Clinton -- have done anything</p> <p>22 illegal?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. Tell me what information you have, what</p> <p>25 firsthand knowledge.</p>	<p style="text-align: right;">277</p> <p>1 MS. FERRARO: Objection. Calls for a legal</p> <p>2 conclusion.</p> <p>3 A. I don't.</p> <p>4 Q. Do you have any firsthand knowledge that 4/9</p> <p>5 Livestock has done anything illegal with regard to the</p> <p>6 operation of the farm?</p> <p>7 MS. FERRARO: Objection. Calls for a legal</p> <p>8 conclusion.</p> <p>9 A. I don't know.</p> <p>10 Q. Do you have any firsthand knowledge that 4/9</p> <p>11 Livestock has done something that is careless or</p> <p>12 irresponsible with regard to the operation of the farm?</p> <p>13 MS FERRARO. Objection. Calls for a legal</p> <p>14 conclusion.</p> <p>15 A. I don't know.</p> <p>16 Q. It's correct that you don't know, really,</p> <p>17 anything about how 4/9 Livestock operates its farm?</p> <p>18 MS. FERRARO: Objection. Mischaracterizes</p> <p>19 his testimony.</p> <p>20 A. No.</p> <p>21 Q. Let me restate it, just to make sure we're</p> <p>22 getting this testimony correct.</p> <p>23 Do you have any information, any firsthand</p> <p>24 knowledge of how 4/9 Livestock operates its farm?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">278</p> <p>1 Q. What firsthand knowledge do you have about 4/9 2 Livestock's operations? 3 A. That they could have used a deodorant to help 4 kill the smell. And they had stated that financially, it 5 would cut into the cost of income, and they could not do 6 that. 7 Q. Who said that? 8 A. Neighbor. 9 Q. A neighbor said that 4/9 Livestock doesn't use 10 deodorizer because it cuts into the finances of their 11 farm? 12 A. Yes. 13 Q. What neighbor said that? 14 A. Randy Allen. 15 Q. Okay. What did Randy Allen base that on, if 16 you know? 17 A. That his boss had talked to Sam about the 18 possibility of being a good neighbor policy, and that he 19 needed to start using a deodorizer to help kill the 20 smell. And Sam refused, told John he could not do that 21 because of the cost of it would make it cost prohibitive 22 into the income that they would receive. 23 Q. Who was Randy Allen's boss that you refer to? 24 A. John Harden. 25 Q. Do you personally know whether or not 4/9</p>	<p style="text-align: right;">280</p> <p>1 MS. FERRARO: Objection. Calls for a legal 2 conclusion. 3 A. I do not know. 4 Q. Do you have any firsthand knowledge of what 5 Cory Himself does with regard to the farm? 6 MS. FERRARO: Objection. Go ahead, 7 actually, you can add that. Sorry. I would strike the 8 objection. You can answer. 9 A. I do not know. 10 Q. Do you have any personal knowledge of what 11 Cory Himself does with regard to the farm and whether it's 12 done in a representative capacity or an individual 13 capacity? 14 MS. FERRARO: Objection. Calls for a legal 15 conclusion. 16 A. I do not know. 17 Q. Do you have any personal knowledge, firsthand 18 knowledge of what Clinton Himself does with regard to the 19 farm? 20 A. I do not. 21 Q. Do you have any personal firsthand knowledge 22 of whether what Clinton Himself does with regard to the 23 farm is done in a representative capacity or an 24 individual capacity? 25 MS. FERRARO: Objection. Calls for a legal</p>
<p style="text-align: right;">279</p> <p>1 Livestock uses deodorizer? 2 A. No. 3 Q. Do you have any firsthand knowledge that any 4 of the individual Himself defendants do something careless 5 or irresponsible with regard to the operation of the 6 farm? 7 MS. FERRARO: Objection. Asked and 8 answered. Calls for legal conclusion. 9 A. I don't know. 10 Q. Do you have any firsthand knowledge that 11 Co-Alliance does something careless or irresponsible with 12 regard to the operation of the farm? 13 MS. FERRARO: Asked and answered. Calls 14 for a legal conclusion. You may answer. 15 A. I do not know. 16 Q. Do you have any firsthand knowledge of 17 Co-Alliance's operations in general? 18 A. No. 19 Q. Do you have any firsthand knowledge of what 20 Samuel Himself does with regard to the farm? 21 A. No. 22 Q. Do you have any personal knowledge whether 23 what Samuel Himself does with regard to the farm is done 24 in a representative capacity or in an individual 25 capacity?</p>	<p style="text-align: right;">281</p> <p>1 conclusion. 2 A. I do not know. 3 Q. Mr. Himself, would you agree that the siting; 4 in other words, the location of the barns has been 5 approved by Hendricks County? 6 A. Based on the information they received, yes. 7 Q. Mr. Himself, would you also agree that the 8 design and constructions of the 4/9 barns have been 9 approved by IDEM? 10 A. I don't know. 11 Q. Mr. Himself, do you contend that the handling 12 of manure on the 4/9 farm has been done in an illegal 13 manner? 14 MS. FERRARO: Objection. Calls for a legal 15 conclusion. 16 A. I do not know. 17 Q. You don't know whether it's been handled in an 18 illegal manner? 19 A. No, I do not. 20 Q. Mr. Himself, do you contend that the handling 21 of the manure has -- at the 4/9 farm has been done in a 22 careless or irresponsible manner? 23 MS. FERRARO: Objection. Calls for a legal 24 conclusion. 25 A. I do not know.</p>

<p>282</p> <p>1 Q. You don't know whether the manure has been 2 handled in a careless or irresponsible manner?</p> <p>3 A. No. I was not there.</p> <p>4 Q. Mr. Himself, do you contend that the land 5 application of the manure from the 4/9 farm has been done 6 in an illegal manner?</p> <p>7 MS. FERRARO: Objection. Calls for a legal 8 conclusion.</p> <p>9 A. I do not know.</p> <p>10 Q. Do you contend that the land application of 11 the manure from the 4/9 farm has been done in a careless 12 or irresponsible manner?</p> <p>13 MS. FERRARO: Objection. Calls for a legal 14 conclusion.</p> <p>15 A. No.</p> <p>16 Q. Mr. Himself, in your opinion, what should the 17 defendants be doing differently?</p> <p>18 MS. FERRARO: Asked and answered. You may 19 try it again.</p> <p>20 THE WITNESS: Hmm?</p> <p>21 MS. FERRARO: You may answer the question.</p> <p>22 A. Location. My biggest hang-up. They led 23 people to believe there was nobody lived close when 24 there's a very -- quite a few people that live in the 25 area.</p>	<p>284</p> <p>1 A. Restate the question, again. Sorry.</p> <p>2 Q. Yeah. I'll do that, sorry.</p> <p>3 Other than your own farm, the hog farm which 4 you operated for years, and the Hardens' farm, which you 5 identified yesterday, have you been on any other hog 6 farms or CAFOs in Indiana?</p> <p>7 A. No.</p> <p>8 Q. Can you tell me all the ways that you claim 9 you've been harmed or damaged as a result of anything the 10 defendants did?</p> <p>11 MS. FERRARO: Objection. Asked and 12 answered.</p> <p>13 A. I think I've covered that.</p> <p>14 Q. Okay. Can you give me a list of those? I 15 know you've mentioned and you believe that your property 16 value has declined; is that correct?</p> <p>17 A. Yes.</p> <p>18 Q. Are you claiming that your health has been 19 impacted?</p> <p>20 MS. FERRARO: Objection. Asked and 21 answered.</p> <p>22 A. I think it has.</p> <p>23 Q. As of this current moment, you're not making 24 any claims for medical bills, correct?</p> <p>25 A. No.</p>
<p>283</p> <p>1 Q. Mr. Himself, have you ever been on the 2 defendants' property?</p> <p>3 A. Not since they've owned it.</p> <p>4 Q. Have you ever taken any photographs or videos 5 of the defendants' property?</p> <p>6 A. No.</p> <p>7 Q. Mr. Himself, are you complaining of any odors 8 or problems as a result of dead hogs at the 4/9 facility?</p> <p>9 A. I'm not sure.</p> <p>10 Q. Have you ever observed any dead hogs at the 11 4/9 facility?</p> <p>12 A. No.</p> <p>13 Q. I asked you a moment ago what should the 14 defendants be doing differently. I'll try to narrow that 15 question.</p> <p>16 In your opinion, how could the farm -- well, 17 in your opinion, could the farm be better operated?</p> <p>18 A. I'm not sure. I don't know everything that's 19 involved in trying to kill odor anymore.</p> <p>20 Q. Mr. Himself, have you been on any other hog 21 farm in Indiana before, other than I think you mentioned 22 yesterday you were on the Hardens' farm, correct?</p> <p>23 A. Yes.</p> <p>24 Q. Any other farms, other than the Hardens'? Hog 25 farms. And your own, of course.</p>	<p>285</p> <p>1 Q. No, that statement is not correct; or no, 2 you're not making any claims for medical bills or 3 expenses?</p> <p>4 A. I'm not making any claims.</p> <p>5 Q. Any other -- excuse me. Any other damages?</p> <p>6 A. Yes.</p> <p>7 Q. What?</p> <p>8 A. Relationship with family, wife, friends.</p> <p>9 Q. Explain how your relationship with your 10 family, wife and friends has been damaged.</p> <p>11 A. Can't be together there to enjoy.</p> <p>12 Q. You can't be together there to enjoy...</p> <p>13 A. Man and wife relationship.</p> <p>14 Q. Mr. Himself, what is the relief that you want 15 from your complaint?</p> <p>16 MS. FERRARO: Objection. Calls for a legal 17 conclusion. Complaint speaks for itself.</p> <p>18 Q. Are you looking to get monetary damages?</p> <p>19 A. Be nice.</p> <p>20 Q. What do you believe that -- go ahead.</p> <p>21 A. This -- my wife and I's relationship has had 22 added expense from travel, eating out more often.</p> <p>23 Q. What do you think is a fair monetary 24 compensation for having the hog farm operate next door?</p> <p>25 MS. FERRARO: Objection. Calls for a legal</p>

<p>334</p> <p>1 Q. -- is that correct?</p> <p>2 A. Negatively impacted the family, and -- you</p> <p>3 know.</p> <p>4 Q. Would you have stopped raising the hogs in</p> <p>5 that way had you known that?</p> <p>6 A. Yes.</p> <p>7 Q. Did the fact that the 400 hogs that you raised</p> <p>8 bothered your wife come into play when you learned that</p> <p>9 8,000 hogs and their waste would be coming in next to</p> <p>10 you?</p> <p>11 A. Repeat the question, please.</p> <p>12 Q. Did the fact that your small number of hogs,</p> <p>13 400 hogs bothered your prior wife play into your concern</p> <p>14 when you learned about the 8,000 hogs that would be</p> <p>15 moving next to you?</p> <p>16 A. Yes, yes.</p> <p>17 Q. How so?</p> <p>18 A. The experience of the odor, the possible</p> <p>19 health issues that you might have. Just the overall</p> <p>20 changing of the community. It was all a very big</p> <p>21 concern.</p> <p>22 Q. So, it was essentially something known to you</p> <p>23 30 years ago, from your two-year experience of confining</p> <p>24 just 400 hogs, that that would cause problems, as opposed</p> <p>25 to allowing hogs to be raised in an open pasture, in an</p>	<p>336</p> <p>1 Q. Is there a reason that you sent it to Sam</p> <p>2 Himself and family?</p> <p>3 A. Because that's who I had the impression that</p> <p>4 actually owned the facilities.</p> <p>5 Q. Is it your understanding that Sam Himself and</p> <p>6 family are the ones that made the decision to build the</p> <p>7 CAFO next to your home?</p> <p>8 A. Yes.</p> <p>9 Q. Have you ever seen -- and when you're --</p> <p>10 excuse me. Who are you referring to when you refer to</p> <p>11 "family," in the "Sam Himself and family"?</p> <p>12 A. Sam Himself and his children.</p> <p>13 Q. Who are -- can you name them, please?</p> <p>14 A. There's Cory Martin. The second one's name</p> <p>15 escapes me. Clint, I think his middle name is Scudder,</p> <p>16 Himself. There's a daughter that I've only seen once. I</p> <p>17 want to say Tara or Kara. I think she finally got a</p> <p>18 degree in elementary teaching, and Sam asked me -- I</p> <p>19 think, because Sam asked me if my son would be interested</p> <p>20 in hiring here as a teacher.</p> <p>21 Q. Did you think that --</p> <p>22 A. I didn't know her very well at all.</p> <p>23 Q. I'm sorry. Did you think --</p> <p>24 A. I --</p> <p>25 Q. I'm sorry. Go ahead.</p>
<p>335</p> <p>1 open setting?</p> <p>2 A. Yeah. Oh, yes.</p> <p>3 Q. Based on your lifetime experience as a farmer,</p> <p>4 in your opinion, is that common knowledge among all</p> <p>5 farmers?</p> <p>6 A. Yes.</p> <p>7 Q. Let's find Exhibit 20.</p> <p>8 We already determined that Sam Himself was the</p> <p>9 applicant for the rezoning of Sam Himself's property,</p> <p>10 correct?</p> <p>11 A. Yes.</p> <p>12 Q. It was not -- 4/9 Livestock was not the</p> <p>13 applicant, correct?</p> <p>14 A. No.</p> <p>15 Q. Nor was Co-Alliance the applicant, correct?</p> <p>16 A. Right.</p> <p>17 Q. And this letter, Exhibit 20, that you sent on</p> <p>18 January 20, 2015, that was sent to Sam Himself and family,</p> <p>19 correct?</p> <p>20 A. Yes.</p> <p>21 Q. That was not sent to 4/9 Livestock?</p> <p>22 A. No.</p> <p>23 Q. It wasn't sent to Co-Alliance?</p> <p>24 A. No. Yes, there was a copy of it was, but this</p> <p>25 letter was addressed to Sam Himself.</p>	<p>337</p> <p>1 A. I knew none of them all that well. I followed</p> <p>2 them through their activities in the paper of sports, and</p> <p>3 I knew that they were -- their mother's father was a very</p> <p>4 big man, and these boys were extremely bigger than their</p> <p>5 dad, Sam.</p> <p>6 Q. So, you -- are you finished? I didn't mean to</p> <p>7 cut you off.</p> <p>8 A. Yes.</p> <p>9 Q. You mentioned Clint, Sam and Cory, which are</p> <p>10 the three defendants that we've named in this lawsuit,</p> <p>11 correct?</p> <p>12 A. Yes.</p> <p>13 Q. And you weren't -- did you assume, when you</p> <p>14 were writing the letter to Sam Himself and family, that</p> <p>15 the daughters were also involved in building --</p> <p>16 A. I wasn't sure at that time. I never thought</p> <p>17 daughter. I figured that Sam would know the appropriate</p> <p>18 family that would -- that I would be referring to.</p> <p>19 Q. When -- so, now that the CAFO has been built,</p> <p>20 I think you testified yesterday that you have</p> <p>21 occasionally seen Sam or one of the boys spreading waste</p> <p>22 on fields next to you. Am I recalling that testimony</p> <p>23 correctly?</p> <p>24 MR. EMENHISER: Objection.</p> <p>25 Mischaracterizes his testimony.</p>

<p>342</p> <p>1 little guy, and he is trying to do something to improve 2 the wealth of his kids. I am trying to hold together 3 something for my kids that might have a little bit of 4 inheritance because I'm going to be 72 years old, and 5 it -- and I feel like this is for them. And financially, 6 it's going to wipe me out because I don't think there's a 7 person in this room who would want to live in that house 8 after this is built and smells that. 9 Anybody have a question, I'd be happy to try 10 to answer. Mr. Watson, thank you. 11 Mr. Himself, may I give these to you. 12 Q. So, in your statement here, as you read that, 13 did everything that you were concerned about essentially 14 come true? 15 A. Very much so, yes. 16 Q. The statement sort of mid-paragraph that says, 17 "Hog factories have a reputation of smelling," do you see 18 that? 19 A. Yes. 20 Q. What was the basis of that statement? 21 A. The intent of that was you mention these 22 facilities to people, and they say, oh, my God, yes, they 23 stink. That's what -- where I talk about reputation is 24 everybody that's ever been close to one, that's the first 25 thing they will tell you is they really smell bad.</p>	<p>344</p> <p>1 Q. So, the concern, in addition to the inability 2 to sell your home -- strike that. 3 You're concerned about, obviously, the 4 inability to sell your home. You've talked to us about 5 that. You've also testified about the impact that it's 6 had on you and Janet and your ability to live in your 7 home, correct? 8 A. Yes. 9 Q. So, when you talk about property value, it's 10 more than just the actual value of the property, correct? 11 A. Yes. It's -- 12 MR. EMENHISER: Objection to the form of 13 the question. 14 Q. You can answer. 15 A. Yes. I love my wife. I married to be with 16 her. I married her to be -- to protect her and make life 17 healthy and good for her. And we could not enjoy these 18 things. It was constantly -- the few times that she was 19 there, you saw hacking and coughing all night long, 20 getting up, walking around, getting a drink of water, 21 maybe I think she might have left a taste in her mouth. 22 She was trying to get rid of that. 23 The enjoyment of working together in the yard 24 and doing flowers and she -- I can show you pictures of 25 tremendous, tremendous flowers that she had and the love</p>
<p>343</p> <p>1 Q. So, this is based on your common knowledge -- 2 A. Common knowledge and communications with other 3 people, family and other people. 4 Q. Other people's experiences that you had heard 5 about? 6 A. Yes. 7 Q. In your lifetime experience as a farmer, is 8 that something else that came into play in your 9 understanding that hog factories have a reputation of 10 smelling? 11 A. Oh, yes. 12 Q. When you said that your property is almost 13 going to go to zero, did you mean that literally, or is 14 that a phrase that you used? 15 A. That was probably a phrase I used at that 16 time, but something I honestly believe today. 17 Q. Okay. And you've already testified that you 18 tried to sell your home, and that was not successful? 19 A. Yes. 20 Q. To your understanding, it was unsuccessful 21 because the people that looked at your property learned 22 about the defendants' CAFO and became uninterested? 23 A. I didn't hide the fact from them. I wanted to 24 be up-front and honest because of the past history, you 25 know, I had to tell them everything I could.</p>	<p>345</p> <p>1 she had for them and the hours she spent watering. You 2 know, just something that she was very, very proud of. 3 You know, her whole family was -- maybe at one 4 time earlier in my life, I didn't have that great 5 appreciation for something like that because it was more 6 along the lines of probably sports. 7 It was substituted along the lines of -- I 8 mean, we would go to flower shows. We would go to -- I 9 can remember specifically at one time, there was an 10 animal or a bug called the Japanese beetle, and we would 11 make a habit of going to nurseries and looking at flowers 12 that could survive the Japanese beetle so we could plant 13 them on our place. 14 We put one -- one year, we put out some 15 chrysanthemums that were absolutely beautiful. She 16 rotated them from yellow to orange, and that Japanese 17 beetle just loved them things. And I guess the biggest 18 thing -- the Japanese beetle has kind of gone by the 19 wayside, but at one time when she was raising flowers, 20 you know, she kind of did a lot of separation. 21 I had to watch where I was at. And she said, 22 do you see my so and so, and I said -- you whacked it off 23 with a weed eater. So, I learned from that to never get 24 close to those flower beds and stay away from them. 25 They were absolutely beautiful. Family would</p>

<p>346</p> <p>1 come and, you know, compliment her on her flowers and ask 2 her questions. They even -- I know one family friend 3 asked us -- asked her to do her -- to do their yard, help 4 them. You know, we weren't kind of in that business. 5 It was something that she could go outside and 6 enjoy. We also -- it was kind of a private place because 7 our place was close to a third of a mile off the road. 8 You know, she could slip out and water flowers real early 9 in the morning and not be detected or anything like that. 10 But it was something that was very, very important to 11 her. 12 Another thing that was really important to her 13 was she had one grandchild and I at the time had two or 14 three, and they were all special to both of us. 15 And you know, when your daughter comes home 16 from New York from a -- for a special visit with my 17 grandson, he would only stay a half hour and left. 18 Cannot take this smell. 19 So, she stayed in Danville. Fully understands 20 what we were dealing with. So, to me, that's the biggest 21 changes that were made to outside. All activities 22 basically stopped because of the odor and the way we 23 felt. We just didn't feel good. 24 Q. So, to put a period on this, it's more than 25 just a dollar loss in your home. This is a loss of your </p>	<p>348</p> <p>1 A. Yes. 2 Q. And Kevin Still of the Co-Alliance was 3 present? 4 A. Yes. 5 Q. I'll direct you where she says, "We are 6 directly across the road and down a little bit from where 7 this is going to go in." Then she says, "I have a friend 8 who lives near a confined feeding operation in another 9 state, and they can't sell their house. They've tried, 10 but nobody wants to live next to this confined feeding 11 operation because, frankly, it stinks." 12 Do you see that? 13 A. Yes. 14 Q. Is what she is relaying about another person 15 in another state consistent with what you've experienced 16 yourself? 17 A. Yes, very much so. 18 Q. She goes down towards the end and says she's 19 really mad because she doesn't have -- she says, "I'm 20 really mad because we don't have more time to prepare 21 something that makes sense and doesn't depend as much on 22 emotion as I feel right now. So, I ask that you defer 23 this, give us time to get together and come up with some 24 better organized arguments against it." 25 Do you see where she says that? </p>
<p>347</p> <p>1 ability to live comfortably in your home, correct? 2 A. Yes. 3 Q. A disruption of your lifestyle? 4 A. Very much so. It just changed. 5 Q. If you could turn to page 6 of Exhibit 26, 6 which is we're still on the partial transcript of the 7 rezoning hearing. Do you see, sort of the middle of the 8 page, the name Ms. Ebershoff-Coles? 9 A. Yes. 10 Q. Do you know Miss Ebershoff-Coles? 11 A. Yes. 12 Q. Who is she? 13 A. She's a neighbor that lives north of me. 14 Q. If you could take a minute to just read her 15 statement there that she gave to the Planning Commission. 16 Yes, Planning Commission. Just read it to yourself. 17 A. Okay. 18 Q. As you read this, do you recall Miss 19 Ebershoff-Coles testifying before the Planning 20 Commission? 21 A. Yes. 22 Q. Do you remember her saying these things? 23 A. Yes. Basically, yes. 24 Q. This is where the defendants, Sam, Cory and 25 Clint, were present? </p>	<p>349</p> <p>1 A. Yes. 2 Q. Do you know what she is referring to there? 3 A. Yes, the -- 4 MR. EMENHISER: Objection. Calls for 5 speculation. Go ahead. 6 A. Yes. The proceedings that's happening and 7 what each -- each one that was there had to say their 8 concerns, and she did it. Nobody had any time to put 9 together anything, you know, basically reasonable because 10 one of the things you'll notice that everybody that 11 talked against it basically said close to the same thing 12 because we had at that time -- I don't -- whether we had 13 met or not, I don't think we had, but nobody had time to 14 organize, and I think there's some other in here that 15 will also bear that out, too. 16 Q. Her sentiment there, is that consistent with 17 how you felt the proceeding had gone? 18 A. Oh, very much so, yes. 19 Q. So, although you got to speak, you didn't feel 20 that it was a fair -- you had a fair chance to present 21 evidence or obtain legal counsel? 22 A. No. 23 Q. I direct to you page 12 of Exhibit 26. Down 24 towards the bottom, you will see Mrs. Stanfield, 25 Mrs. Wanda Stanfield identified. Do you see that? </p>

<p>378</p> <p>1 intense?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And that is how the property where</p> <p>4 4/9 -- the 4/9 barns are located is currently zoned,</p> <p>5 correct?</p> <p>6 A. I assume it is, yes.</p> <p>7 Q. Well, they sought to get the zoning changed</p> <p>8 from AGR to AGI, correct?</p> <p>9 A. Yes.</p> <p>10 Q. And that change actually occurred, correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. Turn to page 4-5 of Exhibit 49. Oh,</p> <p>13 you don't have Exhibit 49? Oh, I'm sorry.</p> <p>14 (Off the record.)</p> <p>15 MS. FERRARO: I'm sorry, what page are you</p> <p>16 on?</p> <p>17 Q. 4-5. Do you have Exhibit 49 now? Do you have</p> <p>18 it?</p> <p>19 A. Yes.</p> <p>20 Q. Under the AGI column, is a CAFO a permitted</p> <p>21 use?</p> <p>22 A. Repeat it, the location.</p> <p>23 Q. Sure. Look at the top. We've got -- the top,</p> <p>24 it says zoning districts, and we've got various zoning</p> <p>25 designations in columns. And then it goes down, and then</p>	<p>380</p> <p>1 Q. However, when we spoke yesterday, you</p> <p>2 indicated that the co-op had very little involvement in</p> <p>3 the operations of that feeding operation, correct?</p> <p>4 A. True enough.</p> <p>5 Q. Okay. The Hendricks County Co-Op wasn't</p> <p>6 responsible for disposing of the waste that the hogs were</p> <p>7 creating, correct?</p> <p>8 A. Right.</p> <p>9 Q. You were responsible for that, correct?</p> <p>10 A. Yes.</p> <p>11 Q. The co-op didn't design the building, correct?</p> <p>12 A. No.</p> <p>13 Q. Okay. The co-op didn't build the building?</p> <p>14 A. No. Yes, they did.</p> <p>15 Q. They built the building?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. Did they design it?</p> <p>18 A. Yes.</p> <p>19 Q. Hmm. Okay.</p> <p>20 Did they design the pit underneath the</p> <p>21 building?</p> <p>22 A. No.</p> <p>23 Q. Who designed that? If you can't recall,</p> <p>24 that's fine.</p> <p>25 A. Oh, I want to be -- I want to be true. Seems</p>
<p>379</p> <p>1 there are types of uses that are down the left-hand side.</p> <p>2 What I'm asking is under the AGI column, is a CAFO a</p> <p>3 permitted use?</p> <p>4 A. I assume, with the proper approval from the</p> <p>5 Planning Commission, it can be.</p> <p>6 Q. Is there a P in this table on page 4-5 of</p> <p>7 Exhibit 49 that identifies a CAFO as a permitted use?</p> <p>8 A. I don't see it, but I'm -- confined feeding</p> <p>9 operation. P means --</p> <p>10 Q. P means permitted. I want you to look under</p> <p>11 the column that says AGI.</p> <p>12 A. Yes.</p> <p>13 Q. There is a P located there, isn't there?</p> <p>14 A. Yes.</p> <p>15 Q. That means a CAFO is a permitted use, correct?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. Your counsel asked you when you owned</p> <p>18 the -- when you operated the confined, confined hog</p> <p>19 operation, she asked you about the Hendricks County Co-Op</p> <p>20 and the arrangement, and she asked if the co-op's hogs</p> <p>21 produced waste. Do you recall that question?</p> <p>22 A. Yes.</p> <p>23 Q. And I think you said that the hogs did produce</p> <p>24 waste, correct?</p> <p>25 A. Yes.</p>	<p>381</p> <p>1 like it was Indiana Silo.</p> <p>2 Q. Were you responsible for maintaining that pit?</p> <p>3 A. Yes.</p> <p>4 Q. And you were responsible for spreading the</p> <p>5 manure?</p> <p>6 A. Yes.</p> <p>7 Q. I'm trying to recall your testimony with your</p> <p>8 counsel earlier. I think that you said that large --</p> <p>9 large CAFOs, the smell travels. Did you say four miles?</p> <p>10 How far did you believe that the smell traveled?</p> <p>11 A. I've heard -- I've heard reports of four to</p> <p>12 five miles.</p> <p>13 Q. Four to five miles.</p> <p>14 A. That was hearsay from other people and not</p> <p>15 what I say myself. I do know it carries a long ways.</p> <p>16 The distance, I can't tell you.</p> <p>17 Q. Okay. The Hardens' operation is located a</p> <p>18 mile-and-a-half southwest of your property, correct?</p> <p>19 A. Yes.</p> <p>20 Q. Have you ever filed any objections regarding</p> <p>21 the Hardens' operation?</p> <p>22 A. No.</p> <p>23 Q. Do you know who big the Hardens' CAFO is?</p> <p>24 A. No.</p> <p>25 Q. Would you be surprised to learn that it's in</p>

<p>382</p> <p>1 excess of 6,000 hogs?</p> <p>2 A. No.</p> <p>3 Q. Southwest is the prevailing wind, correct?</p> <p>4 A. Yes.</p> <p>5 Q. Would you have expected that smells from the</p> <p>6 Hardens' CAFO, which is located a mile-and-a-half from</p> <p>7 you, to travel that distance?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And you've never complained about their</p> <p>10 hog smell?</p> <p>11 A. Never smelled them. Never have smelled them.</p> <p>12 Q. Never have smelled them?</p> <p>13 A. Very good operator, in my opinion.</p> <p>14 Q. Do you know what they might do differently</p> <p>15 than what 4/9 does?</p> <p>16 A. No.</p> <p>17 Q. You also said that you doubt there's more than</p> <p>18 two AGI districts in Hendricks County. What do you base</p> <p>19 that information on?</p> <p>20 A. Driving around the county and what I see and</p> <p>21 what I hear.</p> <p>22 Q. When you drive around the county and you see</p> <p>23 property, can you tell just by looking at the property</p> <p>24 how it's zoned?</p> <p>25 A. Some -- some.</p>	<p>384</p> <p>1 Q. So, would you say that your farming was more</p> <p>2 than what it would take for you to be self-sufficient and</p> <p>3 meet the needs that your family had?</p> <p>4 A. Repeat that again.</p> <p>5 Q. Sure. Would you say that your farming, this</p> <p>6 raising of 400 hogs was more than what it would take for</p> <p>7 your family to be self-sufficient and meet their food</p> <p>8 needs?</p> <p>9 A. Yes.</p> <p>10 Q. Would you say that --</p> <p>11 A. Might have met the food needs, but it probably</p> <p>12 wouldn't have met anything else. We would have froze to</p> <p>13 death or something.</p> <p>14 Q. What's that?</p> <p>15 MS. FERRARO: You've answered the question.</p> <p>16 Q. When you were raising the Hendricks County</p> <p>17 hogs, Hendricks County Co-Op hogs, excuse me, the most</p> <p>18 hogs that you had at any one time was 400, correct?</p> <p>19 A. I remember that as for the year. I don't</p> <p>20 think I ever had that many at one time.</p> <p>21 Q. Okay. What was the most hogs that you believe</p> <p>22 you had at any one time?</p> <p>23 A. Well, I -- let's see. I got to think back 20,</p> <p>24 36 years ago. It -- the year that the hog building was</p> <p>25 built, I think we only got to run one set of hogs through</p>
<p>383</p> <p>1 Q. How so?</p> <p>2 A. Because most of your county roads are zoned</p> <p>3 agricultural business residential. I do know that all</p> <p>4 property along state highways are zoned commercial</p> <p>5 industrial.</p> <p>6 Q. Is there any markings on the roads to identify</p> <p>7 what type of zoning district you're getting into?</p> <p>8 A. Not that I know of.</p> <p>9 Q. Have you looked at any maps to see the number</p> <p>10 of AGI districts?</p> <p>11 A. No. Just my own belief.</p> <p>12 Q. When you were raising hogs for the Hendricks</p> <p>13 County Co-Op, you were raising more hogs than you needed</p> <p>14 to feed your family, correct?</p> <p>15 A. I don't remember that.</p> <p>16 Q. Well, you had 400 hogs that you were raising</p> <p>17 for the co-op. Did you use those hogs and slaughter them</p> <p>18 and use them to feed your family?</p> <p>19 A. I did not slaughter any hogs to feed my</p> <p>20 family.</p> <p>21 Q. Okay.</p> <p>22 A. I got a percentage of the income from the</p> <p>23 hogs. That's all I got. And I don't ever remember a</p> <p>24 check being -- if it was a thousand dollars, we were</p> <p>25 lucky.</p>	<p>385</p> <p>1 because it burnt. It was attached to an old barn. Poor</p> <p>2 judgment, I guess, on my part. So, we never did have it</p> <p>3 for a year.</p> <p>4 I remember when the barn was gone and the hogs</p> <p>5 had been removed by National Byproducts, the dead hogs</p> <p>6 for the co-op, it probably wasn't more than</p> <p>7 two-and-a-half foot of waste in the bottom of the tank.</p> <p>8 So, I would think at one time, probably the most I might</p> <p>9 have had was 230, 240. I'm not sure. I'm just not sure.</p> <p>10 Q. And that barn was, you said, was -- open --</p> <p>11 open-ended? It was an open barn?</p> <p>12 A. Open front.</p> <p>13 Q. Open front. What does that mean?</p> <p>14 A. That it could be closed on three sides. The</p> <p>15 fourth side was open for ventilation, for air, because</p> <p>16 there was no -- at that time, no sophisticated fan</p> <p>17 operation or ventilation area or anything to that effect.</p> <p>18 Q. Okay. So...</p> <p>19 A. As a matter of fact, through the center of the</p> <p>20 building many times I -- I hung what I called a curtain</p> <p>21 just because -- just so the air didn't come in like this</p> <p>22 and swoop. You could break it up. And it was mostly</p> <p>23 built as a Mother Nature thing.</p> <p>24 Q. What --</p> <p>25 A. No sophistication ventilation or anything at</p>

<p>386</p> <p>1 that time.</p> <p>2 Q. What end was -- if -- how was the building</p> <p>3 oriented? Was it -- was it oriented north/south,</p> <p>4 east/west?</p> <p>5 A. The length of the building ran from the east</p> <p>6 to the west.</p> <p>7 Q. Okay. What end was open?</p> <p>8 A. The south.</p> <p>9 Q. South end was open?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And so the north, east and west ends</p> <p>12 had curtains?</p> <p>13 A. The north side was lumber so far, and it seems</p> <p>14 like it was a three-foot area that had a curtain on a</p> <p>15 winch that you could lower and raise and regulate.</p> <p>16 Q. Okay. What about the east and west sides?</p> <p>17 A. They were metal siding building.</p> <p>18 Q. Okay.</p> <p>19 MR. EMENHISER: Can we take a moment?</p> <p>20 THE VIDEOGRAPHER: We are off the record.</p> <p>21 The time is 12:43 p.m.</p> <p>22 (RECESS, FILL IN TIME)</p> <p>23 THE VIDEOGRAPHER: We are back on the</p> <p>24 record. The time is 12:43 p.m.</p> <p>25 BY MR. EMENHISER:</p>	<p>388</p> <p>1 Q. Okay. Nevertheless, you allow the Hardens to</p> <p>2 apply manure on property close to your home?</p> <p>3 A. They own it.</p> <p>4 Q. You didn't put any restrictions on the sale of</p> <p>5 that when you -- when you sold it to them?</p> <p>6 MS. FERRARO: Asked and answered.</p> <p>7 A. History showed that they didn't -- they never</p> <p>8 caused a problem with the manure.</p> <p>9 MR. EMENHISER: No further questions.</p> <p>10 MS. FERRARO: Should we take a lunch break</p> <p>11 since it's 1:00, before we start with --</p> <p>12 MR. EMENHISER: Oh, absolutely. Are we</p> <p>13 done?</p> <p>14 MS. FERRARO: Oh, yes.</p> <p>15 MR. EMENHISER: Let me state for the</p> <p>16 record, then, I'm going to reserve the right to recall</p> <p>17 this witness because he's said a couple of times now</p> <p>18 where he's not sure if he's going to be making a claim</p> <p>19 for personal injuries and medical expenses. We haven't</p> <p>20 received any documentation to that effect.</p> <p>21 Counsel, I believe that you agreed to that</p> <p>22 on the record yesterday so -- that we could, we could</p> <p>23 reconvene the deposition to address that.</p> <p>24 MS. FERRARO: Yes. Absolutely. Yes.</p> <p>25 MR. EMENHISER: Thanks. I just wanted to</p>
<p>387</p> <p>1 Q. Mr. Himself, I just have a couple of final</p> <p>2 questions.</p> <p>3 The 4/9 property, was it zoned AGI prior to</p> <p>4 the construction of the barns, if you know?</p> <p>5 A. I -- I assume that's what the -- what was done</p> <p>6 with the commissioners and the Planning Commission, that</p> <p>7 they had to have a special zoning done, and I assume</p> <p>8 that's what it was.</p> <p>9 Q. Okay. And would you also agree that it was</p> <p>10 zoned AGI prior to the operation of the farm there, of</p> <p>11 the hog farm there?</p> <p>12 A. I assume it was.</p> <p>13 Q. Would you the consider the Hardens traditional</p> <p>14 farmers?</p> <p>15 A. Yes and no.</p> <p>16 Q. Okay. Why do you say yes, first?</p> <p>17 A. Same as Himself. There's two completely</p> <p>18 different operations. There's the green aspect and the</p> <p>19 hog aspect, and it's the same way with the Hardens.</p> <p>20 Q. Okay. Would you consider the Hardens' grain</p> <p>21 aspect to be traditional farming?</p> <p>22 A. Pretty close, yes.</p> <p>23 Q. Okay. And would you consider their hog</p> <p>24 operation to be non-traditional farming?</p> <p>25 A. Yes.</p>	<p>389</p> <p>1 get that on the record.</p> <p>2 THE VIDEOGRAPHER: This concludes volume</p> <p>3 two of the deposition of Martin Richard Himself. We are</p> <p>4 off the record. The time is 12:46 p.m.</p> <p>5 MR. EMENHISER: Thank you for your time.</p> <p>6 (Signature not waived.)</p> <p>7 (CONCLUDED, 12:46 p.m.)</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<div>1 CERTIFICATE OF COURT REPORTER</div> <div>2 I, Marjorie Peters, Registered Merit Reporter,</div> <div>3 Certified Realtime Reporter, before whom the foregoing</div> <div>4 deposition was taken, do hereby certify that the witness</div> <div>5 was placed under oath according to the law; that the</div> <div>6 foregoing transcript is a true and correct record of the</div> <div>7 testimony given; that said testimony was taken by me</div> <div>8 stenographically and thereafter reduced to typewriting</div> <div>9 under my direction and that I am neither counsel for,</div> <div>10 related to, nor employed by any of the parties to this</div> <div>11 case and have no interest, financial or otherwise, in its</div> <div>12 outcome.</div> <div>13 I further certify that signature was not</div> <div>14 waived by the witness.</div> <div>15 I, Joanne Connor, Notary Public in the State</div> <div>16 of Indiana, do hereby certify that the witness was placed</div> <div>17 under oath according to the law.</div> <div>18 IN WITNESS WHEREOF, I have hereunto set my</div> <div>19 hand and affixed my seal this day of , 2016.</div> <div>20 <i>Marjorie Peters</i></div> <div>21</div> <div>22 Marjorie Peters, RMR, CRR</div> <div>23 Court Reporter</div> <div>24</div> <div>25 Joanne Connor</div> <div>Notary Public</div>	<div>390</div> <div>391</div>
<div>1 E R R A T A S H E E T</div> <div>2 IN RE: Himsel/Lannon v. Himsel/4/9 Livestock, et al.</div> <div>3 NAME: Martin Richard Himsel, Volume One</div> <div>4 RETURN BY:</div> <div>5 = = = = =</div> <div>6 PAGE/LINE CORRECTION AND REASON</div> <div>7</div> <div>8</div> <div>9</div> <div>10</div> <div>11</div> <div>12</div> <div>13</div> <div>14</div> <div>15</div> <div>16</div> <div>17</div> <div>18</div> <div>19</div> <div>20</div> <div>21</div> <div>22</div> <div>23</div> <div>24 (DATE) (DEPONENT SIGNATURE)</div> <div>25 NOTARY PUBLIC:</div>	

Martin Richard Himself, Vol. II
May 19, 2016

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1 get that on the record.

2 THE VIDEOGRAPHER: This concludes volume
3 two of the deposition of Martin Richard Himself. We are
4 off the record. The time is 12:46 p.m.

5 MR. EMENHISER: Thank you for your time.

6 (Signature not waived.)

7 (CONCLUDED, 12:46 p.m.)

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x Martin Richard Himself

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In the Matter Of:

MARTIN RICHARD HIMSEL

-VS-

SAMUEL T. HIMSEL

SUSAN LANNON

May 25, 2016



CONNOR REPORTING

111 Monument Circle, Suite 4350

Indianapolis, IN 46204

Phone: 317-236-6022

Fax: 317-236-6015

Toll Free: 800-554-3376

<p>1 STATE OF INDIANA) IN THE HENDRICKS SUPERIOR COURT 2)SS 3 HENDRICKS COUNTY) CAUSE NO. 32D04-150-PL-000150 4 5 MARTIN RICHARD HIMSEL, JANET L.) 6 HIMSEL, ROBERT J. LANNON and) 7 SUSAN M. LANNON,) 8) 9 Plaintiffs) 10) 11 -vs-) 12) 13 SAMUEL T. HIMSEL, CORY M. HIMSEL,) 14 CLINTON S. HIMSEL, 4/9 LIVESTOCK,) 15 LLC, and CO-ALLIANCE, LLP,) 16) 17 Defendants) 18 19 VIDEOTAPED 20 DEPOSITION OF SUSAN M. LANNON 21 22 The videotaped deposition upon oral examination of 23 SUSAN M. LANNON, a witness produced and sworn before me, 24 Karen K. Keim, CRR, RPR, CSR-IL, CCR-MO, Notary Public, 25 taken at Harrington Law, P.C., 105 North Washington Street, Danville, Indiana, on May 25, 2016, and scheduled to begin at 9:00 a.m.</p>	<p>3 4 EXHIBITS (cont'd.) 5 Exhibit 54 Hendricks County Area Plan Commission 69 6 Agenda for March 12, 2013 meeting 7 Exhibit 55 Begins with list of signatures and email 92 8 addresses 9 Exhibit 56 April 18, 2013 letter from 4/9 Livestock 98 10 signed by Cory Himself to "Dear Landowner" 11 Exhibit 57 Calendar entries from April 2015 - 112 12 October 2015 13 Exhibit 58 April 27, 2015 letter from Sally Lawson 114 14 Exhibit 59 May 28, 2015 Letter from Sally Lawson 115 15 Exhibit 60 EnviroTestKit Report 120 16 Exhibit 61 Answers to First Set of Interrogatories 123 17 Exhibit 62 Begins with 2/26/2014 email from Debbie 160 18 Konter 19 Exhibit 63 Begins with 3/11/2013 email from Debbie 167 20 Konter 21 Exhibit 64 Property Value Document from Hendricks 167 22 County Tax Assessor's Office 23 Exhibit 65 Mortgage Pay-off Documents 172 24 Exhibit 66 Begins with 10/15/15 email from Robert 173 25 Lannon to Debbie Konter</p>
<p>2 3 INDEX 4 EXAMINATION 5 6 Witness Name Page 7 SUSAN M. LANNON 8 Direct By Mr. Brian Park 6 9 Direct By Mr. Chris Braun 22 10 Cross By Ms. Kim Ferraro 177 11 12 EXHIBITS 13 14 Exhibit Description Identification 15 Exhibit 1 Hendricks County Comprehensive Plan . 36 16 Exhibit 2 Quality Growth Strategy 50 17 Exhibit 3 Hendricks County Comprehensive Plan - 43 18 June 1998 19 Exhibit 4 Land Use Plan Map - May 1998 48 20 Exhibit 6 GIS Map of area 129 21 Exhibit 14 Warranty Deed Himself and Hardin .. 49 22 Exhibit 18 Tax Assessment of Martin R and Janet L 106 23 Himself property 24 Exhibit 22 March 1, 2013 letter from Ben Comer of 57 25 Comer Law Office Exhibit 23 March 25, 2013 letter from Kruse . 61 Consulting; re: 4/9 Livestock Exhibit 24 Single page of testimony against CAFO 121 Exhibit 25 Additional testimony against CAFO 121 Exhibit 26 Document titled "Before the Hendrix . 70 County Area Plan Commission" Exhibit 27 Zoning Amendment Project Data 63 Exhibit 28 Approval of Zoning Permit 80 Exhibit 29 March 24, 2013 letter from M. Janet and 87 Richard Himself to the Board of Commissioners Exhibit 31 Notice of Decision from IDEM 103 Exhibit 40 Handwritten Diary Hog Farm Factory 100 Exhibit 41 Begins with March 19, 2013 email from 86 Mike Stephens to Debbie Konter Exhibit 43 April 9, 2013 email from Debbie Konter to 90 Hog Farm Group Exhibit 44 Begins with April 9, 2013 email from 91 Janet Himself to Debbie Konter Exhibit 46 Begins with April 2, 2015 email from 114 Richard Himself to Angela Kim and others Exhibit 48 Begins with 2/24/2014 email from Debbie 109 Konter to Ernie Combs; Subject: Dangerous Right-to-Farm Bill Exhibit 52 Copy of Ordinance 2013-003 89 Exhibit 53 Notice of Deposition 23</p>	<p>4 5 A P P E A R A N C E S 6 7 FOR THE PLAINTIFFS: 8 Ms. Kim E. Ferraro 9 Ms. Jordan Chelovich 10 HOOSIER ENVIRONMENTAL COUNCIL 11 407 E. Lincolnway, Suite A 12 Valparaiso, IN 46383 13 219.464.0104 14 kferraro@hecweb.org 15 16 FOR THE DEFENDANTS SAMUEL T. HIMSEL, 17 CORY M. HIMSEL, CLINTON S. HIMSEL, 18 4/9 LIVESTOCK, LLC, and 19 CO-ALLIANCE, LLP: 20 21 Mr. Christopher J. Braun 22 PLEWS SHADLEY RACHER & BRAUN LLP 23 1346 North Delaware Street 24 Indianapolis, IN 46202 25 317.637.0700 cbraun@psrb.com FOR DEFENDANT SAMUEL T. HIMSEL: Mr. Kyle A. Lansberry Mr. Brandon W. Ehrie LEWIS WAGNER, LLP 501 Indiana Avenue, Suite 200 Indianapolis, IN 46202-6150 317.237.0500 klansberry@lewiswagner.com behrie@lewiswagner.com ALSO PRESENT: Mr. Brian L. Park OFFICE OF INDIANA ATTORNEY GENERAL Indiana Government Center South Fifth Floor 302 West Washington Street Indianapolis, IN 46204-2770 317.234.7019 brian.park@atg.in.gov</p>

<p>25</p> <p>1 Q So you reviewed those -- and we'll go over those later</p> <p>2 today, so you don't have to have them memorized, and</p> <p>3 I'm not going to quiz you on that, but we will go</p> <p>4 through those.</p> <p>5 Aside from the Interrogatory responses, do you</p> <p>6 recall any other documents that you reviewed in</p> <p>7 preparation for today?</p> <p>8 A As I told the other gentleman, I did check online the</p> <p>9 different articles and that that -- from Purdue</p> <p>10 University Extension and the CAFO's -- I mean, there</p> <p>11 are tons of them. I couldn't hit all of them.</p> <p>12 Q Sure.</p> <p>13 A But things like that.</p> <p>14 Q Okay. All right. I want to switch now and just get a</p> <p>15 better understanding of your background.</p> <p>16 A Okay.</p> <p>17 Q When did you first move to the house you currently</p> <p>18 live in?</p> <p>19 A My husband already had the house, and I think it was</p> <p>20 1972, and we married in 1974.</p> <p>21 Q And did your husband build the house, or was it an</p> <p>22 existing home that he purchased?</p> <p>23 A He had bought -- not bought the house but built the</p> <p>24 house with his previous wife.</p> <p>25 Q Okay. And you've lived there continuously ever since</p>	<p>27</p> <p>1 Q Okay. Do you recall roughly how many?</p> <p>2 A Not offhand I don't.</p> <p>3 Q Okay. And then starting from 1972 forward, the ground</p> <p>4 on which the hog barns are located, has that always</p> <p>5 been farmland?</p> <p>6 A To my knowledge, yes.</p> <p>7 Q Okay. So from '72 until --</p> <p>8 A Well, '74. Let me correct you on that.</p> <p>9 Q I'll get to him tomorrow on '72. Thank you.</p> <p>10 A Right. He's '72; I'm '74.</p> <p>11 Q So from 1974 until September of 2013, that ground on</p> <p>12 which the 4/9 Livestock hog barns are currently</p> <p>13 located was always just farmland?</p> <p>14 A Correct.</p> <p>15 Q And then since September of 2013, it's been</p> <p>16 consistently used for the hog farm; is that correct?</p> <p>17 A Since '13?</p> <p>18 Q Since September 2013 when they built it?</p> <p>19 A Yes.</p> <p>20 Q And they haven't done any other changes or</p> <p>21 improvements on that property, that you're aware of?</p> <p>22 A Not that I'm aware of.</p> <p>23 Q Okay. Mr. Park asked you earlier -- I just want to</p> <p>24 clarify -- about any prior litigation. You testified</p> <p>25 earlier you had been a witness to a car accident one</p>
<p>26</p> <p>1 1972?</p> <p>2 A Yes, '74.</p> <p>3 MS. FERRARO: Let him get his question out.</p> <p>4 THE WITNESS: Okay. Thank you.</p> <p>5 Q And, obviously, I wasn't there in 1974. What else was</p> <p>6 out there at the time you moved into the house, in</p> <p>7 terms of development? And let me start with the house</p> <p>8 that Mr. and Mrs. Himself currently live in across the</p> <p>9 street from you. That was there then, correct?</p> <p>10 A Correct.</p> <p>11 Q The -- and you understand, obviously, where the</p> <p>12 current 4/9 Livestock hog barns are today, correct?</p> <p>13 A Correct.</p> <p>14 Q Do you recall when Mr. Richard Himself lived next door</p> <p>15 to that?</p> <p>16 A Yeah, yes.</p> <p>17 Q Okay. And so when he lived next to where the current</p> <p>18 hog barns are located, do you recall him raising hogs</p> <p>19 on that property?</p> <p>20 A I don't know what he raised for sure.</p> <p>21 Q Okay.</p> <p>22 A I was more with what his father raised right across</p> <p>23 the street from us -- or road from us.</p> <p>24 Q And what was that?</p> <p>25 A He had some hogs, yes.</p>	<p>28</p> <p>1 time that you were deposed in.</p> <p>2 A Correct.</p> <p>3 Q Have you had any other involvement in a lawsuit,</p> <p>4 either as a witness or as a party?</p> <p>5 A The only one that I have mentioned was when my brother</p> <p>6 sued me against my parents' estate.</p> <p>7 Q How long ago was that?</p> <p>8 A '97.</p> <p>9 Q It's been long resolved, I hope?</p> <p>10 A Yes.</p> <p>11 Q Good. Okay. Let me focus now, if I could briefly, on</p> <p>12 your educational background. Could you, starting with</p> <p>13 high school, tell me where you graduated from and</p> <p>14 when?</p> <p>15 A I graduated from Beech Grove High School in Beech</p> <p>16 Grove, Indiana in 1970. Then I attended Ball State</p> <p>17 University for three years, maybe four -- three.</p> <p>18 Didn't graduate.</p> <p>19 Q And since you finished at Ball State in roughly '73,</p> <p>20 '74 time frame --</p> <p>21 A Correct.</p> <p>22 Q Since then have you had any additional education in</p> <p>23 terms of classes, seminars, any certificate training?</p> <p>24 A No, no formal education.</p> <p>25 Q Okay.</p>

<p>125</p> <p>1 just want to know as to your firsthand knowledge of</p> <p>2 the facts -- of any facts -- and we'll go through --</p> <p>3 that were raised either by your Complaint or in the</p> <p>4 Interrogatories. Okay?</p> <p>5 A Okay.</p> <p>6 Q So that's where we're going now.</p> <p>7 Aside from your current neighbors, have you</p> <p>8 talked with anyone who lives near a CAFO?</p> <p>9 A My husband has a friend that we've met on a cruise</p> <p>10 that lives in Georgia that lives by -- I think it's a</p> <p>11 turkey CAFO. And he says the smell is horrendous.</p> <p>12 Q And was that cruise before or after this --</p> <p>13 A After -- we've gone on for the last two years in</p> <p>14 February.</p> <p>15 Q Have you talked with anyone regarding the 4/9</p> <p>16 Livestock CAFO, aside from your counsel and aside from</p> <p>17 your neighbors?</p> <p>18 A I ran into a stranger one day at Walmart and commented</p> <p>19 to her about how nasty the smell was. And she's an</p> <p>20 older woman and commented that she remembers farming</p> <p>21 as it used to be, and she says she's been exposed to</p> <p>22 the CAFO's also. Where, I don't know. But she said</p> <p>23 she felt very sorry for us.</p> <p>24 Q Okay.</p> <p>25 A Mainly it was the toxic smells that you have to incur.</p>	<p>127</p> <p>1 Q And do you have any idea how many cattle?</p> <p>2 A No.</p> <p>3 Q The next one says the Thomas' have dairy cows and</p> <p>4 sheep. How far away do the Thomas' live from you?</p> <p>5 A I'd say a little more than a half mile due west.</p> <p>6 Q And you don't know how many dairy cows or sheep they</p> <p>7 have?</p> <p>8 A I would guess 50 dairy cattle; and, I don't know,</p> <p>9 maybe a couple dozen sheep would be a guess.</p> <p>10 Q You go on to say in the next paragraph that, "The</p> <p>11 Lannon's neighbors directly to the east have always</p> <p>12 had chickens. About 4 or 5 years ago, these same</p> <p>13 neighbors had 13 goats living in a 500 square foot</p> <p>14 pen. The smell was really bad because the neighbors</p> <p>15 allowed several feet of manure to accumulate with the</p> <p>16 goats in the pen." Do you see that?</p> <p>17 A Yes.</p> <p>18 Q What can you tell me about that beyond what you've</p> <p>19 stated here?</p> <p>20 A They, instead of trying to clean out any of the</p> <p>21 manure, left it there to where the goats were in it,</p> <p>22 and it was very toxic because of the high ammonia</p> <p>23 smell in the urine and the feces.</p> <p>24 Q How far away did they live from you?</p> <p>25 A Right next door. I don't -- they're on an acre. I</p>
<p>126</p> <p>1 Q And when you say "toxic smells", have you had any</p> <p>2 medical professional inform you that the odors are</p> <p>3 toxic?</p> <p>4 A No medical --</p> <p>5 MS. FERRARO: Excuse me. I'll object just to the</p> <p>6 extent that that calls for a medical conclusion, and</p> <p>7 stipulate that we are not making claims for medical</p> <p>8 injuries or personal injuries.</p> <p>9 But you can answer to the extent you can.</p> <p>10 A No medical at this time.</p> <p>11 Q Any toxicologist?</p> <p>12 A No, sir. May I throw in there that --</p> <p>13 MS. FERRARO: No.</p> <p>14 THE WITNESS: No. Okay.</p> <p>15 Q In your -- if you go to the answer to Interrogatory</p> <p>16 No. 9, where you state that the Lannon's will testify</p> <p>17 that they have never farmed as many of their neighbors</p> <p>18 do. For example, the Stevens have cattle which have</p> <p>19 never caused an odor problem for the Lannon's.</p> <p>20 Where do the Stevens live relative to where you</p> <p>21 live?</p> <p>22 A I would say a quarter mile, if that, to the west on</p> <p>23 350.</p> <p>24 Q And are their cattle indoor or outdoor?</p> <p>25 A Outdoor.</p>	<p>128</p> <p>1 have a half acre, so it's relatively close.</p> <p>2 Q And you go on to state that, "The Lannons called the</p> <p>3 Hendricks County Humane Society, Hendricks County</p> <p>4 Animal Control, and the Hendricks County Department of</p> <p>5 Health"; do you see that?</p> <p>6 A Yes.</p> <p>7 Q Have you called any one of those three agencies to</p> <p>8 complain about the 4/9 Livestock operation?</p> <p>9 A I myself personally have not.</p> <p>10 Q Okay. Have you lodged a complaint with any</p> <p>11 governmental agency regarding the odors on your</p> <p>12 property?</p> <p>13 A I have not. My husband did once.</p> <p>14 Q Do you know with whom?</p> <p>15 A One of the Commissioners.</p> <p>16 Q One of the Hendricks County Commissioners?</p> <p>17 A Yes.</p> <p>18 Q And do you remember when that was?</p> <p>19 A A few weeks ago, the same time we smelled the pig</p> <p>20 manure that was spilled or they were knifing or</p> <p>21 cutting it into the field. I don't know what they</p> <p>22 were doing, but it was 7 or 8 or 9 in what I consider</p> <p>23 a very toxic level.</p> <p>24 Q And what was the response from the Commissioner?</p> <p>25 A Nothing he could do about it.</p>

<p style="text-align: right;">129</p> <p>1 Q Would you turn to Exhibit 6 in your binder. 2 (Exhibit 6 3 presented to the witness.) 4 Q This was a document that I believe Mr. Himsel marked 5 up. It's obviously a map showing various lots and 6 roadways, et cetera, including where your house is, 7 where Dick Himsel's house is and where the 4/9 8 Livestock operation is; do you see that? 9 A Yes. 10 Q Could you mark on there where your house is? You can 11 just put an "X" if you would. 12 A (Indicating) I'm the third of the fourth house, if you 13 can see those little houses right there (indicating). 14 Q I'm just coming to look over your shoulder. 15 (Pause) 16 Q Where was it? 17 A There's four houses right here. I'm the third. 18 Q Okay. And where was the pig manure that you were 19 talking about two or three weeks ago that was spread? 20 A It would have been in this field (indicating). 21 Q Would you go ahead and mark the field? 22 A (Indicating) 23 Q Can I see your binder for a second? 24 (Pause) 25 A I'll look at it again to make sure, but I think that</p>	<p style="text-align: right;">131</p> <p>1 Q Interrogatory No. 10 reads, Paragraph 14 of the 2 Complaint alleges that, quote, Co-Alliance LLP owns 3 the hogs that are warehoused at the CAFO. Has 4 production contract with 4/9 Livestock and/or the 5 Himsel Defendants, and exercises substantial 6 operational control of the CAFO. Do you see that? 7 A Um-hum, yes. 8 Q What is your understanding of the operational control 9 that Co-Alliance exercises over the CAFO? 10 MS. FERRARO: I'm just going to object to the 11 extent that calls for a legal conclusion. 12 Q If you don't know, that's fine. Again, I'm trying to 13 get your firsthand knowledge of -- 14 A I have no firsthand knowledge, but I can assume, and I 15 don't think you want me to do that. 16 Q No, no. Okay. Have you seen the production contract 17 between 4/9 Livestock and Co-Alliance? 18 A No. 19 Q Have you ever talked to anyone at Co-Alliance as to 20 what they do as it relates to the raising of the hogs? 21 A No. 22 Q On Interrogatory No. 11 on the next page, the 23 Interrogatory reads, after quoting from the Complaint 24 in your answer, "Identify any and all steps you took 25 to A, oppose the zoning petition filed on behalf of</p>
<p style="text-align: right;">130</p> <p>1 was it. 2 Q I thought your earlier testimony was it was in the 3 land across the street from you. 4 A No, no, no. That was a few years ago. Last year, 5 last year was across the road. This one a few weeks 6 ago was down back behind Cory's house. 7 Q Okay. 8 A And I think that's Cory's house (indicating). It's 9 hard to tell from this map. 10 Q So when you say -- the manure went on the field; is 11 that correct? 12 A Yes. 13 Q It wasn't spilled in the roadway? 14 A Not to my knowledge. 15 Q Okay. And were you there when they were applying it, 16 or did you just smell it? 17 A I just smelled it. 18 Q Okay. On Interrogatory No. 10, the next page, this 19 references a paragraph from your Complaint, and I'll 20 just read it. It says "Co-Alliance LLP owns the hogs 21 that are warehoused at the" -- 22 A Wait a minute. On 10? 23 MS. FERRARO: We're back to this. 24 Q I'm sorry, Exhibit 61, Interrogatory No. 10. 25 (Pause)</p>	<p style="text-align: right;">132</p> <p>1 4/9 Livestock with the Hendricks County Plan 2 Commission to rezone the farm." 3 My question to you is have you already described 4 all -- any and all steps you took to oppose the zoning 5 petition with the Hendricks County Plan Commission? 6 A Yes. 7 Q Which, if I understand your testimony, was you 8 attended the hearing, but you didn't testify? 9 A Correct. 10 Q And you didn't submit any written objections, correct? 11 A No. 12 Q Okay. The next one is, "Appeal the decision by 13 Hendricks County relating to the rezoning of the Farm, 14 Himsel property and/or the Lannon property." 15 And I believe your testimony earlier was that you 16 did not appeal the decision by the Hendricks County 17 Commission, correct? 18 A Correct. 19 Q And what was the reason for that? 20 A I personally didn't know that you could. Plus I would 21 think the money. 22 Q In Interrogatory No. 12, it's asking about an 23 allegation in your Complaint regarding the rezoning 24 process, and what I'm interested in is the answer 25 below. I'll just read the key part from the</p>

<p>141</p> <p>1 operations?</p> <p>2 MS. FERRARO: And I'm just going to object and</p> <p>3 reiterate the objection that this calls also for</p> <p>4 expert and legal opinion.</p> <p>5 But to the extent she understands the question,</p> <p>6 she can answer.</p> <p>7 A It has changed my life to where I never thought I</p> <p>8 would have to pay attention to which way the wind blew</p> <p>9 to hang my laundry outside, to enjoy my gardening</p> <p>10 which I love, my flowers. I don't have any friends</p> <p>11 anymore that want to come out because of the smell.</p> <p>12 It's given me such anxiety, worrying that if I get up</p> <p>13 in the morning, am I going to smell it? Can I open my</p> <p>14 windows? I'm already running my air conditioner</p> <p>15 full-time, which is unheard of. I just never thought</p> <p>16 it would be like this, that somebody would take such</p> <p>17 advantage of me and my family and the people around</p> <p>18 us. I never in my life thought people were so</p> <p>19 inconsiderate and selfish. I never did. I'm sorry.</p> <p>20 Q No, I'm sorry you're having to go through that.</p> <p>21 A It's -- when your doctor says, "I'm sorry. You need</p> <p>22 medication to settle down or you're going to have a</p> <p>23 heart attack" because of the stress of it, it's not</p> <p>24 worth it. It's not.</p> <p>25 Q Let me ask you this. Has the level of the odors or</p>	<p>143</p> <p>1 into now. Okay?</p> <p>2 So my question is, are you aware of any acts</p> <p>3 undertaken by -- let's start with Sam Himsel in his</p> <p>4 individual capacity, that you believe give rise to any</p> <p>5 claim or liability?</p> <p>6 MS. FERRARO: I'm going to object to the extent</p> <p>7 that calls for a legal conclusion.</p> <p>8 A Could you repeat that, please?</p> <p>9 Q Yeah. And -- well, let me come at it from a different</p> <p>10 angle. Is it your understanding that 4/9 Livestock is</p> <p>11 owned by Sam, Cory, and Clint Himsel?</p> <p>12 A I understand that.</p> <p>13 Q Okay. And is it your understanding that all three of</p> <p>14 them also work for 4/9 Livestock as employees?</p> <p>15 MS. FERRARO: I'll object to the extent that</p> <p>16 calls for a legal conclusion.</p> <p>17 A I assume they do.</p> <p>18 Q Okay. And so what I want to understand is -- I think</p> <p>19 I have a good understanding of your complaints against</p> <p>20 4/9 Livestock and the odors that emanate from there.</p> <p>21 What I want to know is, as you sit here today,</p> <p>22 are you aware of anything that they've done in their</p> <p>23 individual capacity, separate and apart from whatever</p> <p>24 they may have done on behalf of 4/9 Livestock, any act</p> <p>25 or omission they may have committed or failed to do</p>
<p>142</p> <p>1 the frequency changed at all from the time it first</p> <p>2 opened in September, October, 2013 to today?</p> <p>3 A Yes.</p> <p>4 Q How so?</p> <p>5 A We've noticed -- and we're just guessing, because they</p> <p>6 don't call us to tell us when they're going to have a</p> <p>7 new load come in or anything, but the older the pigs</p> <p>8 are the worse the smell is. And I don't know what the</p> <p>9 timeline is or any of that. But -- and it also has to</p> <p>10 do with prevailing winds. Thank God this year spring</p> <p>11 so far has been northwest, northeast. Every once in a</p> <p>12 while we get it from the northeast and we get their</p> <p>13 other place over on 200 West, but that has nothing to</p> <p>14 do with this. But it's --</p> <p>15 Q Have you had any out-of-pocket expenses?</p> <p>16 A A lot more air freshener, medication, time away. So I</p> <p>17 guess that would be extra gas money, so we just don't</p> <p>18 have to be confronted with it.</p> <p>19 Q Have you had any sampling of the odors done?</p> <p>20 A No. My own nose.</p> <p>21 Q Okay. One of these -- in Interrogatory No. 34, what I</p> <p>22 need to get an understanding from you is the</p> <p>23 difference between Cory, Clint, and Sam Himsel in</p> <p>24 their individual capacity versus those three acting on</p> <p>25 behalf of 4/9 Livestock. That's the area I want to go</p>	<p>144</p> <p>1 that you believe has caused you harm?</p> <p>2 MS. FERRARO: And I'll, again, object on the</p> <p>3 basis that that calls for a legal conclusion.</p> <p>4 You can answer.</p> <p>5 A Why they did what they did is beyond me.</p> <p>6 Q But did they do that on behalf of 4/9 Livestock?</p> <p>7 A I don't know.</p> <p>8 MS. FERRARO: Again, objection.</p> <p>9 A I don't know. I don't know. I don't know their</p> <p>10 intent behind it. I can't read their minds.</p> <p>11 Q Okay. Do you know -- is it your understanding that</p> <p>12 the property on which the hog barns is located is</p> <p>13 owned by 4/9 Livestock?</p> <p>14 A I do now.</p> <p>15 Q Okay. Is it your understanding that the 4/9 Livestock</p> <p>16 is the entity responsible for raising the hogs?</p> <p>17 MS. FERRARO: Objection; calls for a legal</p> <p>18 conclusion. Also speculation.</p> <p>19 A I would think it is, yeah.</p> <p>20 Q Okay. Do you have any firsthand knowledge of anything</p> <p>21 that -- again, we'll just go -- that Sam Himsel in his</p> <p>22 individual capacity -- not on behalf of 4/9, just in</p> <p>23 his individual capacity, anything you can point to to</p> <p>24 say he either did something wrong or failed to do</p> <p>25 something that's caused you harm?</p>

<p>181</p> <p>1 development."</p> <p>2 So, do you see that paragraph there?</p> <p>3 A Yes.</p> <p>4 Q Going back to, sort of, our brief discussion about the</p> <p>5 County recognizing different sorts of agricultural</p> <p>6 uses, within agriculture there can be competing land</p> <p>7 uses as well; would that be your understanding --</p> <p>8 totally your understanding, not as an expert or</p> <p>9 lawyer?</p> <p>10 A To my understanding, land usage is farming. Farming</p> <p>11 is planting corn, wheat, beans, maybe animals, but</p> <p>12 it's more of a free-range thing. That's the way I was</p> <p>13 brought up and that's what I first saw when I moved</p> <p>14 out here after we were married. There was open range.</p> <p>15 The pigs walked, the cows walked, everybody walked the</p> <p>16 ground. They weren't in any buildings as, per se,</p> <p>17 like there is with the CAFO.</p> <p>18 Q Just to make sure I understand, since you lived there</p> <p>19 since 1974 until the date the Defendant's built their</p> <p>20 confined animal feeding operation, that's not what you</p> <p>21 associated with agriculture; is that correct?</p> <p>22 A No, no.</p> <p>23 Q And if you look underneath the Goals and Objectives</p> <p>24 section here, under "Action Steps", it talks about</p> <p>25 developing standards for CAFO's to permit the</p>	<p>183</p> <p>1 A Yes.</p> <p>2 Q And you had said you had not participated?</p> <p>3 A No, I had not participated.</p> <p>4 Q Would the fact that you just testified that your view</p> <p>5 of agriculture is something not related to a CAFO,</p> <p>6 would that play into why you didn't participate in any</p> <p>7 planning -- scratch that.</p> <p>8 Would that -- would the fact that your view of</p> <p>9 agriculture as one of traditional farms, for lack of a</p> <p>10 better word, play into why you didn't participate in</p> <p>11 any comprehensive planning?</p> <p>12 A Not only that, but raising the family, I was more</p> <p>13 intent with what they were doing and sports and my</p> <p>14 family's life than to be concerned about farming and</p> <p>15 things like that, as what they've done now compared to</p> <p>16 what I knew farming. As a little girl, we'd go to my</p> <p>17 grandpa's in Muddy, Illinois, and he had cattle, and</p> <p>18 it wasn't anything for us to walk in cow manure or</p> <p>19 watch a cow urinate or anything like that.</p> <p>20 So I was very familiar with what we now call, you</p> <p>21 know, free-grazing cattle and that. So it's not been</p> <p>22 anything that I've been shy of. Now growing up, I did</p> <p>23 not grow up with anything that's around here until we</p> <p>24 came out here, and my sons did help with, you know --</p> <p>25 we'd see the pigs, we'd see the cows. And I</p>
<p>182</p> <p>1 development and expansion of CAFO's in agriculturally</p> <p>2 designated areas or as a special exception use and to</p> <p>3 include ordinances -- in ordinances, a requirement to</p> <p>4 provide buffers between CAFO's and residential</p> <p>5 development; do you see that?</p> <p>6 A Yes, I do.</p> <p>7 Q So even the County there, would you agree, is</p> <p>8 recognizing that CAFO's next to residential areas can</p> <p>9 be problematic?</p> <p>10 A Yes.</p> <p>11 Q And that's been your experience since the Defendants</p> <p>12 built their CAFO next to you, correct?</p> <p>13 A Yes. And may I also say with buffers, there's no</p> <p>14 buffer around this facility, none.</p> <p>15 Q Okay. If you can pull out Exhibit 49 for me.</p> <p>16 (Pause)</p> <p>17 Q Are you there?</p> <p>18 A Yes, ma'am.</p> <p>19 Q Okay. Just before we leave talking about the</p> <p>20 Comprehensive Plans, I believe counsel asked you a</p> <p>21 question or two about whether you had ever raised a</p> <p>22 concern or were involved in any of the planning</p> <p>23 committees or groups to raise concerns about the</p> <p>24 comprehensive planning. Do you recall that line of</p> <p>25 questioning?</p>	<p>184</p> <p>1 distinctly remember one year we went to Ayre's Bunny's</p> <p>2 Barnyard, and the boys said, "Can we go home? Because</p> <p>3 I get to pet them there."</p> <p>4 So with the neighbors that we have had, the boys</p> <p>5 have been able to be around livestock and enjoy, you</p> <p>6 know -- the enjoyment of them.</p> <p>7 Q So, in other words, there really wasn't a problem for</p> <p>8 you to be concerned about?</p> <p>9 A No, no. I'm not into politics and that line, no. So,</p> <p>10 that's -- I'm not a farmer. Why would I be</p> <p>11 interested?</p> <p>12 Q Had you known -- I believe you testified that you</p> <p>13 weren't aware of the comprehensive planning process,</p> <p>14 but had you known that your area would continue to be</p> <p>15 designated for a rural agricultural use, would that</p> <p>16 have raised a concern for you?</p> <p>17 MR. BRAUN: Objection; calls for speculation.</p> <p>18 Subject to that, she can answer.</p> <p>19 A If it involved me directly, yes. Not to sound</p> <p>20 cold-hearted, but if it's not affecting me, I'm not</p> <p>21 interested.</p> <p>22 Q Right. Well, so my question was, had you known -- as</p> <p>23 you read through earlier with Mr. Braun, that area</p> <p>24 where you live is designated an agricultural area?</p> <p>25 A Correct.</p>

<p>213</p> <p>1 regulations for smell like there is for noise -- at 2 least as of yet. I hope the technology has progressed 3 enough that one day there is something. I mean, 4 it's -- the air emissions for some factories, they can 5 do, because it's set, like, off of their chimneys -- 6 or their air stacks, their smokestacks, to where they 7 could. 8 But with this, it's such a broad area that I 9 don't think that there would be any way that they 10 could. I could be wrong. I don't know. 11 Did that answer -- no? 12 Q That's okay. It's been a long day, and my question 13 was probably a poor one. I guess what I'm getting at 14 is, if there is a permit that is issued that regulates 15 a problem, but it's not the problem you have, right? 16 IDEM doesn't regulate odors, and their permit doesn't 17 regulate odors, what difference would it make to 18 appeal it, right? 19 A Yeah, correct. It's like blowing into the wind, and 20 that's not going to do you any good. 21 Q You testified before that -- I think your testimony 22 was you're opposed to all CAFO's; do you recall that 23 testimony? 24 A Yes. 25 Q And I believe you testified that you have concerns</p>	<p>215</p> <p>1 whiff of this stuff -- and I literally vomit, it's -- 2 I just can't explain what it does to me. I really 3 can't. It's caught in my throat. I just -- I have to 4 turn around and go back inside. It makes me sick. It 5 just makes me sick. 6 MS. FERRARO: That's all I have. 7 MR. BRAUN: I don't have any other questions. 8 Thank you very much for coming in today. I appreciate 9 it. 10 VIDEOGRAPHER: This concludes the videotaped 11 deposition of Susan Lannon taken on May 25th, 2016. 12 The current local time is 4:18 p.m. and we are off the 13 record. 14 15 AND FURTHER THE DEPONENT SAITH NOT. 16 17 18 19 20 21 22 23 24 25</p>
<p>214</p> <p>1 about the way animals are treated in CAFO's? 2 A Yes. 3 Q And you're concerned about impacts on neighbors of 4 CAFO's? 5 A Yes. 6 Q But you've never brought a lawsuit against any other 7 owners of a CAFO before this, correct? 8 A Correct. 9 Q So not liking CAFO's and what they do is different 10 than filing a lawsuit against a CAFO, correct? 11 A Yes. 12 Q Does your general dislike of confined animal feeding 13 operations have anything to do with you bringing this 14 lawsuit? 15 A Somewhat, but also the smell and what they've done has 16 been part of the reason. Like I said, it's impacted 17 my life and my way of life, like, 95 percent. 18 Q So if the CAFO that the Defendants built near you was 19 not causing any of the troubles, any of the harm to 20 you and your property that you claim it is, would you 21 have brought the lawsuit just because you don't like 22 CAFO's? 23 A Probably not. If it smelled like roses or the traffic 24 wasn't so excessive, probably I would not. But when 25 you feel like you want to vomit every time you get a</p>	<p>216</p> <p>1 STATE OF INDIANA) 2) 3 COUNTY OF MARION) 4 5 I, Karen K. Keim, CRR, RPR, CSR-IL, CCR-MO, 6 Notary Public, do hereby certify that SUSAN M. LANNON, 7 the deponent herein, was first duly sworn to tell the 8 truth, the whole truth, and nothing but the truth in 9 the aforementioned matter; 10 That the foregoing deposition was taken on 11 behalf of the Defendants, at Harrington Law, P.C., 105 12 North Washington Street, Danville, Indiana, on May 25, 13 2016, pursuant to the Indiana Rules of Trial 14 Procedure; 15 That said deposition was taken down in 16 stenograph notes and afterwards reduced to typewriting 17 under my direction, and that the typewritten 18 transcript is a true record of the testimony given by 19 the said deponent; and that signature was reserved by 20 the deponent and all parties present; 21 That the parties were represented by their 22 counsel as aforementioned. 23 I do further certify that I am a 24 disinterested person in this cause of action, that I 25 am not a relative or attorney of either party or otherwise interested in the event of this action; and</p>

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1 that I am not in the employ of the attorneys for any
2 party.

3 IN WITNESS WHEREOF, I have hereunto set my hand
4 this 7th day of June, 2016.

5

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Karen Keim

8

9 Karen K. Keim

Certified Realtime Reporter

10 Illinois CSR No. 84-1577

Missouri CCR No. 1328

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Susan Lannon
May 25, 2016

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1 whiff of this stuff -- and I literally vomit, it's --
2 I just can't explain what it does to me. I really
3 can't. It's caught in my throat. I just -- I have to
4 turn around and go back inside. It makes me sick. It
5 just makes me sick.

6 MS. FERRARO: That's all I have.

7 MR. BRAUN: I don't have any other questions.
8 Thank you very much for coming in today. I appreciate
9 it.

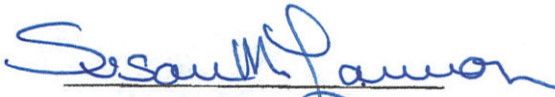
10 VIDEOGRAPHER: This concludes the videotaped
11 deposition of Susan Lannon taken on May 25th, 2016.
12 The current local time is 4:18 p.m. and we are off the
13 record.

14

15 AND FURTHER THE DEPONENT SAITH NOT.

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17



18

SUSAN M. LANNON

19

20 END TIME: 4:18 P.M.

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24

25

In the Matter Of:

MARTIN RICHARD HIMSEL

VS

SAMUEL T. HIMSEL

ROBERT LANNON

May 26, 2016



CONNOR REPORTING

111 Monument Circle, Suite 4350

Indianapolis, IN 46204

Phone: 317-236-6022

Fax: 317-236-6015

Toll Free: 800-554-3376

<p>1 STATE OF INDIANA) IN THE HENDRICKS SUPERIOR COURT 2)SS 3 HENDRICKS COUNTY) CAUSE NO. 32D04-150-PL-000150 4 5 MARTIN RICHARD HIMSEL, JANET L.) 6 HIMSEL, ROBERT J. LANNON and) 7 SUSAN M. LANNON,) 8) 9 Plaintiffs) 10) 11 -vs-) 12) 13 SAMUEL T. HIMSEL, CORY M. HIMSEL,) 14 CLINTON S. HIMSEL, 4/9 LIVESTOCK,) 15 LLC, and CO-ALLIANCE, LLP,) 16 Defendants) 17 18 VIDEOTAPED 19 DEPOSITION OF ROBERT LANNON 20 21 The videotaped deposition upon oral examination of 22 ROBERT LANNON, a witness produced and sworn before me, 23 Karen K. Keim, CRR, RPR, CSR-IL, CCR-MO, Notary Public, 24 taken at Harrington Law, P.C., 105 North Washington Street, 25 Danville, Indiana, on May 26, 2016, and scheduled to begin at 9:00 a.m.</p>	<p>3 4 5 EXHIBITS (CONT.D) 6 7 Exhibit 64 Property Record Summary 42 8 Exhibit 66 10/15/2015 email from Robert Lannon to 87 9 Debbie Kotner 10 Exhibit 67 Notice of Deposition 15 11 Exhibit 68 Amended Answers to Interrogatories 101 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>2 3 INDEX 4 EXAMINATION 5 6 Witness Name Page 7 ROBERT LANNON 8 Direct By Mr. Chris Braun 6 9 Cross By Ms. Kim Ferraro 109 10 Re-Direct By Mr. Chris Braun 143 11 12 EXHIBITS 13 14 Exhibit Description Identification 15 Exhibit 1 1983 Hendricks County Comprehensive Plan 16 16 Exhibit 22 March 1, 2013 letter from Attorney Ben 19 17 Comer 18 Exhibit 23 March 5, 2013 letter from Kruse .. 21 19 Consulting 20 Exhibit 26 Partial Transcript from March 12, 2013 129 21 hearing on rezoning application 22 Exhibit 27 Zoning Amendment Project Data, March 5, 24 23 2013 24 Exhibit 28 Notice from Don Reitz to Hendricks County 28 25 Area Plan Commission 26 Exhibit 29 March 24, 2013 letter from Janet and Dick 73 27 himsel to the Board of Commissioners 28 Exhibit 31 Notice of Decision 35 29 Exhibit 39 Complaint 59 30 Exhibit 40 Handwritten Diary, Hog Farm Factory . 78 31 Exhibit 42 Begins with 3/21/2014 email from Janet 73 32 Himself to large group of recipients 33 Exhibit 43 4/9/2013 email from Debbie Konter to Hog 74 34 Farm Group, Subject: Meeting Tonight 35 Exhibit 44 Begins with April 29, 2013 email from 76 36 Janet Himself to Debbie Konter and others 37 Exhibit 46 4/2/2015 email from Richard Himself 82 38 confirming meeting 39 Exhibit 47 Begins with August 27, 2014 email from 80 40 Janet Himself to Debbie Konter and others 41 Exhibit 48 2/24/2014 email re: Dangeous 79 42 Right-to-Farm Act 43 Exhibit 49 Hendricks County Zoning Ordinance 117 44 Exhibit 51 Handwritten note 78 45 Exhibit 54 Hendricks County Area Plan Commission 22 46 Agenda for March 12, 2013 meeting 47 Exhibit 55 Handwritten list of names 96 48 Exhibit 56 April 18, 2013 letter from 4/9 Livestock 77 49 Exhibit 61 Answers to First Set of Interrogatories 39 50 Exhibit 62 Begins with 2/26/2014 email from Debbie 91 51 Konter</p>	<p>4 5 A P P E A R A N C E S 6 7 FOR THE PLAINTIFFS: 8 9 Ms. Kim E. Ferraro 10 HOOSIER ENVIRONMENTAL COUNCIL 11 407 E. Lincolnway, Suite A 12 Valparaiso, IN 46383 13 219.464.0104 14 kferraro@hecweb.org 15 16 FOR THE DEFENDANTS SAMUEL T. HIMSEL, 17 CORY M. HIMSEL, CLINTON S. HIMSEL, 18 4/9 LIVESTOCK, LLC, and 19 CO-ALLIANCE, LLP: 20 Mr. Christopher J. Braun 21 PLEWS SHADLEY RACHER & BRAUN LLP 22 1346 North Delaware Street 23 Indianapolis, IN 46202 24 317.637.0700 25 cbraun@psrb.com 26 27 FOR DEFENDANT SAMUEL T. HIMSEL: 28 Mr. Kyle A. Lansberry 29 Mr. Brandon W. Ehrie 30 LEWIS WAGNER, LLP 31 501 Indiana Avenue, Suite 200 32 Indianapolis, IN 46202-6150 33 317.237.0500 34 klansberry@lewiswagner.com 35 behrie@lewiswagner.com</p>

<p>1 interest plus attorney fees plus whatever. So -- and 2 that was the extent of it. 3 Q Were you deposed in that case? 4 A Yes. 5 Q Okay. And was it about your work experience? 6 A Right. Mainly because I was in the IT area, and the 7 IT area prepared a lot of reports that had to do with 8 vacation earnings for employees. 9 Q Okay. And aside from the L. S. -- was that a class 10 action lawsuit? 11 A Yes. 12 Q Okay. Aside from that L. S. Ayres class action 13 lawsuit and this lawsuit, have you had any other 14 experiences where you were either a party to a lawsuit 15 or you testified in a lawsuit? 16 A No. 17 Q Okay. Let's -- in terms of brief background, could 18 you walk me through your educational background 19 starting with high school? 20 A Okay. Graduated from high school in 1964, Lafayette, 21 Indiana. Went to Indiana State University for two 22 years following that. Ran out of money. Moved to 23 Indianapolis to pursue a job that I had part-time in 24 Indianapolis, and took a few classes while I was 25 working part-time to get enough money to go back to</p>	<p>11 1 A I had a part-time job with L. S. Ayres and Company at 2 the time, and I was working part-time and going to 3 school to try to generate enough money to get back to 4 Indiana State -- which never happened because of the 5 Army; and went into the Army and I came back, and my 6 job was waiting for me at L. S. Ayres, and I worked, I 7 think, it was 10 days short of 25 years for L. S. 8 Ayres until '91 when they closed all of their back 9 office functions. 10 Q So approximately '67 -- '66 through '91? 11 A Right. 12 Q Okay. What was your official title? 13 A When I left was Director of Data Processing. 14 Q Okay. What were your duties and responsibilities as 15 Director of Data Processing? 16 A Management, basically, of all of the processing of 17 records and entries for department stores for L. S. 18 Ayres. 19 Q And then after you left L. S. Ayres and Company, what 20 was your next job? 21 A I went to work for a company called CTI Group. At the 22 time, they were called CompuCom, but eventually it 23 ended up as CTI Group, in downtown Indianapolis, and 24 they were a software integrator, developer. They also 25 provided computing services for major carriers, small</p>
<p>10 1 school. In the interim, I was drafted into the 2 military and spent two years in the US Army; one year 3 in Vietnam. 4 Q Thank you for your service. 5 A Thank you. 6 Other than that, classes afterward. Lots of 7 stuff that had to do with IT through IUPUI, IBM. All 8 the vendors that we did business with provided lots of 9 classes and education. So -- 10 Q Did you ever get a degree? 11 A I have, like, an associates degree from Indiana 12 College. 13 Q Okay. 14 A And I think they merged with somebody else at the 15 time, and I'm not really sure who they are now. It's 16 been so long ago. 17 Q So you got your AA and then you've had a series of 18 seminars and workshops and -- to continue to advance 19 your understanding in the IT field? 20 A Yes, sir. 21 Q Okay. All right. And then on your employment 22 background, starting with -- let's start with when you 23 moved back to Indianapolis and had a part-time job. 24 From that forward, if you could briefly walk me 25 through your employment background.</p>	<p>12 1 billing enterprises that -- in the telecom industry. 2 Q How long were you with CTI Group? 3 A 20 years. 4 Q So from roughly '92 to 2012? 5 A Yes, sir. 6 Q And what was your position when you retired or when 7 you left CTI? 8 A I was Senior Account Manager and Sales. 9 Q And what were your duties and responsibilities as 10 Senior Account Manager and Sales? 11 A Take care of major accounts and, basically, make sure 12 that all of the major accounts were looked after very 13 carefully, to make sure that they were all satisfied 14 with our services. 15 Q Okay. And then, have you worked anywhere else since 16 2012 when you left CTI Group? 17 A No, sir. 18 Q So you're full-time retired since then? 19 A Full-time retired. 20 Q Okay. Now I want to shift over to where you live. 21 A Okay. 22 Q If I understand correctly from your wife, Mrs. Lannon, 23 yesterday she testified that she moved into your -- 24 where you both currently live, in 1974, but you had 25 started living there prior to that. What year was</p>

<p>13</p> <p>1 that?</p> <p>2 A 19 -- I think actually in 19 -- late 1971.</p> <p>3 Q Okay. And did you build that home?</p> <p>4 A Yes, sir.</p> <p>5 Q Okay. Do you remember about what you paid for the</p> <p>6 home?</p> <p>7 A It was somewhere between 22 and 25,000, because the</p> <p>8 land was the down payment at the time through the</p> <p>9 bank.</p> <p>10 Q So you owned the ground, and you just borrowed to</p> <p>11 build the house?</p> <p>12 A Yes, sir.</p> <p>13 Q Okay. And were there any other homes on either side</p> <p>14 of you at that time?</p> <p>15 A Yes, sir.</p> <p>16 Q Okay. And then the Himsel farm -- now I'm talking</p> <p>17 about Art and Dick Himsel. Their farm was located</p> <p>18 across the street from you at that time; is that</p> <p>19 correct?</p> <p>20 A Correct. It would have been Art and Helen Himsel and</p> <p>21 not Dick.</p> <p>22 Q Okay. And then the ground on which -- where 4/9</p> <p>23 Livestock is currently located, that roughly 58 acres,</p> <p>24 that was just farmland used for crops; is that</p> <p>25 correct?</p>	<p>15</p> <p>1 (Exhibit 67</p> <p>2 presented to the witness.)</p> <p>3 Q Okay. Mr. Lannon, I'm going to hand you Exhibit 67,</p> <p>4 which is the Notice of Deposition that I sent to your</p> <p>5 counsel back on May 13th; do you see that?</p> <p>6 A Yes, sir.</p> <p>7 Q Have you seen this document before today?</p> <p>8 A No, sir.</p> <p>9 Q Okay. But you were notified by your counsel that you</p> <p>10 would have your deposition today; is that correct?</p> <p>11 A Yes, sir.</p> <p>12 Q Okay. What did you do to prepare for today's</p> <p>13 deposition?</p> <p>14 A Basically, spoke to my counsel and just tried to bring</p> <p>15 back into memory things that happened all the way back</p> <p>16 to when we first built the house there and when the</p> <p>17 CAFO was built.</p> <p>18 Q Aside from your counsel, did you talk -- did you talk</p> <p>19 with your wife about it?</p> <p>20 A Yes.</p> <p>21 Q Okay. Anything in particular you talked to her about?</p> <p>22 A No. We were just trying to --</p> <p>23 MS. FERRARO: Actually, I'm going to object based</p> <p>24 on privilege. I'm going to object based on privilege.</p> <p>25 Discussions between the two of the Plaintiffs about</p>
<p>14</p> <p>1 A That's correct.</p> <p>2 Q And if I understood correctly yesterday from your</p> <p>3 wife, from now what we'll say 1971 through September</p> <p>4 of 2013, that 58 acres was always used for just</p> <p>5 farmland, growing crops, that sort of thing?</p> <p>6 A Correct.</p> <p>7 Q Okay. Okay. In the interest of efficiency, you were</p> <p>8 here yesterday for the first half of your wife's</p> <p>9 deposition through noon. Was there anything that you</p> <p>10 heard in terms of your wife's answers that you either</p> <p>11 felt like you needed to correct or amend, or were you</p> <p>12 satisfied with her answers?</p> <p>13 MS. FERRARO: I'm just going to object to the</p> <p>14 extent that he's not reviewed the transcript.</p> <p>15 Q No, understood. Anything that jumped out at you --</p> <p>16 we're going to go through some of the same stuff from</p> <p>17 yesterday, I'm just thinking in terms of was there</p> <p>18 anything that jumped out at you that you felt like</p> <p>19 either you needed to correct or add on? Because I'm</p> <p>20 not going to go into the same level of detail today</p> <p>21 because you were here yesterday, but we'll go through</p> <p>22 the documents but in more summary fashion.</p> <p>23 A I can't answer that question. As my attorney said,</p> <p>24 I'd have to review the documents to see if her answers</p> <p>25 were what you really asked.</p>	<p>16</p> <p>1 today, I don't know that that's something that you can</p> <p>2 discover.</p> <p>3 MR. BRAUN: Were you present?</p> <p>4 MS. FERRARO: Well, again, they're husband and</p> <p>5 wife and they're both Plaintiffs, so they have a</p> <p>6 shared privilege.</p> <p>7 MR. BRAUN: You're asserting the husband and wife</p> <p>8 privilege?</p> <p>9 MS. FERRARO: I am.</p> <p>10 Q All right. Aside from your wife and your counsel, did</p> <p>11 you talk with anyone else -- for instance, Dick and</p> <p>12 Janet Himsel -- in preparation for today?</p> <p>13 A No.</p> <p>14 Q Did you talk with anyone from Hendricks County?</p> <p>15 A No.</p> <p>16 Q Okay. Did you review any documents in particular in</p> <p>17 preparation for today?</p> <p>18 A I'm trying to think. No, I don't think so.</p> <p>19 Q Okay. If you would, turn to Exhibit No. 1 in the</p> <p>20 binder next to you, Mr. Lannon. I'm sorry. It's in</p> <p>21 the binder here.</p> <p>22 (Exhibit 1</p> <p>23 presented to the witness.)</p> <p>24 Q That is the -- and, again I will go through in a more</p> <p>25 summary fashion today, because we went through in</p>

<p>49</p> <p>1 previously owned by Sam Himself. At the time the 2 petition for rezoning was filed, I'll represent to you 3 that Sam Himself owned the property. It's a matter of 4 public record and there's a deed there, et cetera. 5 Okay? 6 A Okay. 7 Q That property, after it was rezoned, was then conveyed 8 over to 4/9 Livestock, and I'll represent that to you, 9 that that's actually what happened. Okay? 10 A Okay. 11 Q Thereafter, the permits issued by -- or the approvals 12 issued by IDEM to construct it and operate it were 13 issued to 4/9 Livestock, LLC. Okay? 14 A Okay. 15 Q And what I want to ask you now is, based on those 16 facts -- which I'll represent to you happened, okay? 17 I'm not asking you to independently verify. Are you 18 aware of anything that was done by Cory, Clint, or Sam 19 in their individual capacity that would give rise to 20 any liability or cause you any harm? 21 MS. FERRARO: I'll object. That calls for a 22 legal conclusion and an expert opinion. And I think 23 that you're asking him to understand agency theory, 24 and the difference between, you know, acting on behalf 25 of the corporation versus acting individually. And</p>	<p>51</p> <p>1 MS. FERRARO: Same objection. 2 A I don't know. 3 Q And as you sit here today, have Cory, Clint, or Sam 4 Himself ever trespassed on your property? 5 MS. FERRARO: Calls for a legal conclusion. 6 A Not to my knowledge. 7 Q Okay. Has Co-Alliance ever trespassed on your 8 property? 9 MS. FERRARO: Same objection. 10 A Not to my knowledge. 11 Q And to your knowledge, has Co-Alliance ever stepped 12 foot on your property, other than providing you 13 natural gas? 14 A Not to my knowledge. 15 Q Have Cory, Clint, or Sam Himself ever set foot on your 16 property? 17 A Not to my knowledge, unless they did it while I wasn't 18 present. 19 Q Okay. Since 2012, have you done any major 20 improvements or invested any significant dollars into 21 your home or property? 22 A Yes, sir. 23 Q What does that consist of? 24 A Remodeling, complete remodeling of the kitchen. 25 Q And when was that done?</p>
<p>50</p> <p>1 that is quite clearly a legal concept. 2 You can answer to the extent you know. 3 A I don't think I would understand the differences. 4 Q But you just testified a moment ago, if you were 5 working on behalf of L. S. Ayres, it was L. S. Ayres' 6 exposure, not yours individually, correct? 7 A That's true. 8 Q Okay. And L. S. Ayres was a corporation? 9 A Correct. 10 Q And a Limited Liability Corporation is a corporation 11 also. 12 A Correct. 13 Q And you understand that 4/9 Livestock, LLC is a 14 Limited Liability Corporation? 15 A I do now. 16 Q Okay. And so my question is this: Again, are you 17 aware, as you sit here today, of any act or omission 18 by Cory, Clint, or Sam Himself -- in their individual 19 capacity, that's caused you harm? 20 MS. FERRARO: I'll, again, object. It calls for 21 a legal conclusion. 22 A I don't know. 23 Q But you can't point to anything they've done 24 individually, as you sit here today, that you believe 25 was negligent?</p>	<p>52</p> <p>1 A 2014. 2 Q Anything else? 3 A Just normal maintenance, paint, anything else, upkeep. 4 Q Okay. 5 A General upkeep. 6 Q Okay. Since the 4/9 Livestock CAFO was built and 7 became operational, have you ever filed a complaint or 8 lodged a complaint with Indiana Department of 9 Environmental Management? 10 A With what management? 11 Q Indiana Department of Environmental Management? 12 A No, sir. 13 Q Have you ever contacted anyone from Hendricks County 14 to express any displeasure or complaints about the 4/9 15 Livestock CAFO? 16 A Yes, sir. 17 Q And who was that? 18 A County Commissioner. 19 Q And who was that? 20 A I think his name is Commissioner Gentry. 21 Q Okay. And when was that? 22 A I'm not sure of the date. I would say a month or two 23 months ago. 24 Q And what did you tell Commissioner Gentry? 25 A I told Commissioner Gentry that the smell was</p>

<p>53</p> <p>1 atrocious and that it was unbearable at the time, 2 could not even go outside. 3 Q And what was Commissioner Gentry's response? 4 A Commissioner Gentry's response at the time, I think, 5 if I remember right, was that he said that there would 6 be odor emission from the CAFO and we could go to the 7 Tax Assessor's office and ask for a reduction in 8 property taxes because of the CAFO. 9 Q And did you? 10 A No, not yet. 11 Q Was there any other relief that Commissioner Gentry 12 identified to you that might be available to you, 13 other than potential reduction of tax assessment? 14 A No, sir. 15 Q Did you try to encourage anyone other than the Himsels 16 to join you in this lawsuit? 17 A No, sir. 18 Q Do you know why the neighbors on either side of you 19 did not join in this lawsuit? 20 A The neighbors to the west of us are only there maybe 21 five months a year, maybe six at the most, because 22 they are in Florida from the time -- like October 23 through May. The other side, I don't know -- we don't 24 speak that often so, no. Other than that, no. 25 Q Do you know if the neighbors that -- who are present</p>	<p>55</p> <p>1 new houses there. 2 Q So you've got three new houses there, and then how 3 many -- I'm trying to get my directions here, that you 4 were referencing earlier, up the road on 425? 5 A I think there's three new houses there, too. 6 Q Okay. Have you talked with any of those six -- are 7 all six of them occupied now, or are they under 8 construction? 9 A I think they're completed. 10 Q Okay. Have you talked with any of the folks who live 11 in those six new homes as to any concerns they may 12 have about building a brand new home in such close 13 proximity to a CAFO? 14 A Yes, and they did not know that the CAFO was going to 15 be built there, and they would not have built that 16 house if they had known that a CAFO was going to be 17 built in the area. 18 Q And so when were these houses built? 19 A I'm not really sure of the date. 20 Q They were all built before the CAFO was constructed? 21 A I can't answer that, to be truthful with you. I'm not 22 sure. 23 Q Did you talk, before you filed suit, with any realtors 24 or appraisers or anyone else who might be able to 25 provide you some support for a potential diminution of</p>
<p>54</p> <p>1 but you don't talk to much, do you know whether they 2 have complained of any odors on their property as 3 well? 4 A I have no idea. 5 Q As the property owner, do you have any understanding 6 of what you believe your house is worth? 7 A General idea. 8 Q And what do you believe it is? 9 A I would believe that it's worth somewhere in the 160 10 to 180 range. 11 Q Okay. So a little north of what the Tax Assessor's 12 office says? 13 A Correct. 14 Q And what do you base that on? 15 A Well, at the time, I based it on other houses in the 16 area, what they were selling for. 17 Q Are you aware of any new houses that have been built 18 within a one-mile radius since the 4/9 Livestock CAFO 19 was constructed? 20 A Yes, sir. 21 Q And where were those located? 22 A Those are located on the same road, 425 West, that the 23 CAFO is, and -- I'm trying to think. And across 24 236 on -- I'm trying to think what the road is. Maybe 25 it's 300 West or something like that. There's three</p>	<p>56</p> <p>1 property value claim? 2 A No, sir. 3 Q Have you had your property tested for odors? 4 A No, sir. 5 Q Do you know whether any of your neighbors have had 6 their properties tested for odors? 7 A Can't answer that. 8 Q One of the documents that your counsel provided to me 9 yesterday was the water results that were performed 10 about a year ago, and they were addressed to you. Do 11 you recall that? 12 A Yes, sir. 13 Q And I just want to confirm, that's the only testing of 14 your water that's been done, say, in the last five 15 years; is that correct? 16 A Correct. 17 Q And the test results came back that your water was 18 safe to drink? 19 A Yes, sir. 20 Q Are you aware of any migration from the 4/9 Livestock 21 CAFO onto anyone else's property as to subsurface, 22 impacting ground water? 23 A No, sir. I can't answer that. 24 Q You're not aware of anyone who has complained that 25 their drinking water has been adversely affected by</p>

<p>1 MS. FERRARO: Again, that calls for a legal 2 conclusion. 3 But you can answer to the extent you have an 4 opinion about that. 5 A I am not sure what Co-Alliance has done to impact my 6 life. 7 Q As to Clint Himsel, what can you point to that he's 8 done that you believe was negligent? 9 MS. FERRARO: Same objection. Calls for a legal 10 conclusion. 11 A I can't answer that. 12 Q Because you don't know? 13 A I don't know. 14 Q Okay. And the same with respect to Cory Himsel? 15 A Same answer. 16 Q Okay. You don't know. And is the same thing true as 17 to Sam as well? 18 A Yes, correct. 19 Q Okay. And the same thing is true as to 4/9, as to the 20 construction of its facility, correct? 21 A Correct. 22 Q And is the same answer that you provided earlier, that 23 you've not personally developed what you believe are 24 compensatory damages as it relates to your negligence 25 count?</p>	<p>65</p> <p>1 asserting a claim for trespass or nuisance, correct? 2 A Can't answer that, because I don't know what other 3 damages that the CAFO could do to that area. 4 Q Well, as you sit here today, what damages have been 5 accrued to that area? 6 MS. FERRARO: I'm going to object. This calls 7 for a legal conclusion and an expert conclusion, and 8 it really calls for speculation as well. And the 9 Complaint speaks for itself as to what we're claiming. 10 You may answer. 11 A I'm going to agree with my attorney on that answer. I 12 can't answer that question, because I'm not an expert 13 in those areas. 14 Q Yeah, and, again, all I'm trying to do is understand 15 the basis for your concern in this case. 16 As I heard your wife articulate yesterday, and, I 17 believe, you this morning, your principal negative 18 impact arises from odor on your property periodically. 19 A Correct. 20 Q And so, again, if there is no odor -- I'm trying to 21 understand. Is there anything else out there that you 22 believe has negatively impacted you as to the 4/9 23 CAFO? 24 A The impact of constant traffic and trucks up and down 25 the road at all hours of the day and night, delivering</p>
<p>66</p> <p>1 MS. FERRARO: Objection; form of the question. 2 A I don't even know what that question means. 3 Q Well, remember under Paragraph 67, I asked you if you 4 had developed what you believe to be compensatory 5 damages in the event you would prevail in this case. 6 And you said you didn't know because you hadn't done 7 that yet. And I have the same question here for 8 Number II under "Negligence". Does the same answer 9 apply, that as you sit here today, you've not 10 developed yet what you believe to be the compensatory 11 damages that you might recover in this case in the 12 event that you were successful? 13 A Correct. 14 Q Okay. As to Paragraph 69 regarding the Count III for 15 trespass, the trespass that you're claiming in this 16 case is because the odors that have traveled across 17 the ground over onto your property; is that a fair 18 statement? 19 MS. FERRARO: Objection; calls for a legal 20 conclusion. 21 But you can answer. 22 A Yes. 23 Q Okay. And, again, that's all I'm trying to 24 understand, Mr. Lannon, is that -- and I'll state as I 25 said earlier. If there is no odor, you would not be</p>	<p>68</p> <p>1 feed, moving cattle -- moving hogs in and out, 2 disruption, and whatever damage -- other damages the 3 CAFO could possibly do have impacted our life. 4 Q And what other ways in which the CAFO might possibly 5 impact you? 6 A Could possibly have polluted the water, but I don't 7 know that yet, because I'm not an expert. Could have 8 possibly decreased my property value, because nobody 9 wants to live next to a CAFO. I don't know of other 10 things, but I'm sure if I sat down and thought for a 11 long time, I could probably come up with some other 12 conclusive answers. 13 Q And as you sit here today, if I understand your 14 earlier testimony, you've not done anything yet to 15 quantify any potential property damage loss, correct? 16 A Correct. 17 Q And is the same true -- 18 MS. FERRARO: Hold on. I'm just going to object 19 to that to the extent that you did not distinguish 20 between what his counsel has done versus what he has 21 done. If you want to make that a continuing -- 22 MR. BRAUN: It is. It is, and that's why I 23 opened the deposition today -- 24 MS. FERRARO: Okay. 25 Q I don't want to know anything your lawyer has done.</p>

<p style="text-align: right;">105</p> <p>1 to any of the Defendants about how to abate or lessen</p> <p>2 the odor?</p> <p>3 A No, I have not.</p> <p>4 Q Are you aware of anything that can be done to abate</p> <p>5 the odor?</p> <p>6 A Yes, I am. There is supposedly, from what another</p> <p>7 CAFO owner said, that there's additives that can be</p> <p>8 added to the feed to lessen the odor or eliminate the</p> <p>9 odor. I'm not sure which.</p> <p>10 Q And who was that CAFO owner?</p> <p>11 A I think that's John Hardin.</p> <p>12 Q When did you talk to him?</p> <p>13 A I did not talk to him. It was hearsay -- or somebody</p> <p>14 else had talked to him, and they had said that.</p> <p>15 Q Do you believe the Defendants are operating the farm</p> <p>16 in an illegal manner?</p> <p>17 MS. FERRARO: Objection; calls a legal</p> <p>18 conclusion.</p> <p>19 A I can't answer that.</p> <p>20 Q Is there anything you can point to that you believe</p> <p>21 that 4/9 Livestock or any of the Defendants have done</p> <p>22 anything in an irresponsible way?</p> <p>23 A I only can go back to an incident that was well</p> <p>24 verified and published in 1998, where the Himsel</p> <p>25 brothers were fined for spillage in the other CAFO</p>	<p style="text-align: right;">107</p> <p>1 A Can't answer that, no.</p> <p>2 Q Anything that you saw from a distance in observing the</p> <p>3 manure being spread on the land that was negligent?</p> <p>4 MS. FERRARO: Objection; calls for a legal</p> <p>5 conclusion.</p> <p>6 A Can't answer that.</p> <p>7 Q And as you sit here today -- I think you answered this</p> <p>8 earlier -- you're not aware of anything as to the</p> <p>9 design or the construction of the 4/9 Livestock</p> <p>10 facility that was -- that was not in compliance with</p> <p>11 the IDEM permits, correct?</p> <p>12 A No, I'm not.</p> <p>13 MS. FERRARO: Objection; calls for a legal</p> <p>14 conclusion.</p> <p>15 Q As you sit here today, has 4/9's operations at the</p> <p>16 CAFO violated any laws?</p> <p>17 MS. FERRARO: Objection; calls for a legal</p> <p>18 conclusion.</p> <p>19 A Can't answer that.</p> <p>20 Q Can't answer because you don't know?</p> <p>21 A I don't know.</p> <p>22 Q Have you ever taken any photos or videos of the 4/9</p> <p>23 CAFO?</p> <p>24 A No, I have not.</p> <p>25 Q Have you ever contacted the Police or Sheriff's</p>
<p style="text-align: right;">106</p> <p>1 they owned, and for supposedly spillage from their --</p> <p>2 this CAFO, due to the insertion of the remains or the</p> <p>3 results of, you know, the underground pits where all</p> <p>4 of the urine and everything else goes, the waste into</p> <p>5 the ground that was spilled on other property.</p> <p>6 Q Is it your understanding that the pig manure is spread</p> <p>7 on the farm fields as fertilizer?</p> <p>8 A That's correct.</p> <p>9 Q Do you have any understanding as to the number of</p> <p>10 acres required for disbursement of the pig manure as</p> <p>11 fertilizer?</p> <p>12 A No, I do not.</p> <p>13 Q Do you know if there is any sort of formula that you</p> <p>14 have to have, you know, per acre versus per quantity</p> <p>15 of pig manure to be stored and then spread?</p> <p>16 A I am sure there's a formula, because there seems to be</p> <p>17 a formula for everything when it comes to fertilizer</p> <p>18 and planting and farming and all of the rest of that.</p> <p>19 Q Have you ever observed firsthand any of the spreading</p> <p>20 the manure from the 4/9 CAFO onto any of the</p> <p>21 surrounding fields?</p> <p>22 A Only at a distance.</p> <p>23 Q Okay. Was there anything that you observed from the</p> <p>24 distance that you believe the land application of the</p> <p>25 manure was improper?</p>	<p style="text-align: right;">108</p> <p>1 Department about the 4/9 operations?</p> <p>2 A No, I have not.</p> <p>3 Q I think you testified earlier you've not contacted any</p> <p>4 Hendricks County official regarding 4/9's operations,</p> <p>5 is that right, other than Commissioner Gentry?</p> <p>6 A Other than Commissioner Gentry.</p> <p>7 Q Do you have any understanding as to how often the</p> <p>8 manure is taken from the storage in the hog barns and</p> <p>9 is spread on the fields?</p> <p>10 A I do not know that.</p> <p>11 Q We talked earlier about -- in your Prayer for Relief</p> <p>12 in your Complaint, we went through the compensatory</p> <p>13 damages components. Do you remember that discussion</p> <p>14 generally?</p> <p>15 A Yes.</p> <p>16 Q And we also talked about the Right-to-Farm Act</p> <p>17 generally.</p> <p>18 A Correct.</p> <p>19 Q Beyond those discussions, is there any other relief</p> <p>20 you're seeking in this lawsuit that we haven't</p> <p>21 covered?</p> <p>22 MS. FERRARO: Objection; calls for a legal</p> <p>23 conclusion.</p> <p>24 But you may answer.</p> <p>25 A Not that I know of at this time.</p>

<p>113</p> <p>1 A No.</p> <p>2 Q Nothing that -- well, actually why don't you tell us?</p> <p>3 What is the -- currently, when you are experiencing</p> <p>4 the odors from the Defendant's confined feeding</p> <p>5 operation, what is that like for you? What is the</p> <p>6 experience that you have?</p> <p>7 A The experience to me is the smell of death, and for</p> <p>8 anybody that's been in the military and been in an</p> <p>9 occupation where there is combat -- and I've been in</p> <p>10 combat, and I was severely wounded in combat and seen</p> <p>11 people die. It is the smell of death. It's almost</p> <p>12 the same as being in combat. Smelling the pig odor</p> <p>13 reminds me of that continually.</p> <p>14 Q And how is this impacted your and Susan's life?</p> <p>15 A We don't spend much time outside anymore. We try to</p> <p>16 pick our times when we can do yard work, cut the</p> <p>17 grass. What little, minimal garden we have anymore</p> <p>18 is, you know -- you're limited to how much time you</p> <p>19 can spend outside to do the things you need to do.</p> <p>20 You know, if you would look at our property years</p> <p>21 ago compared to when after they built the CAFO, you</p> <p>22 would see a large difference between all of the</p> <p>23 flowers that were grown and everything else. Susan</p> <p>24 was very dedicated to that.</p> <p>25 Q Okay. And so none of the farms that were around</p>	<p>115</p> <p>1 A If I would have known that they were trying to change</p> <p>2 it from strictly agricultural to agricultural</p> <p>3 intensive in a planning meeting, I probably would have</p> <p>4 attended that meeting.</p> <p>5 Q Okay. I see -- you misunderstood my question.</p> <p>6 A I'm sorry.</p> <p>7 Q No, that's okay. There were a few questions where</p> <p>8 Mr. Braun pointed out to you that comprehensive</p> <p>9 planning had gone on since 1983 in the County.</p> <p>10 A Okay.</p> <p>11 Q And, generally, your area, your property, the land</p> <p>12 where the Defendants' CAFO now is built, was deemed to</p> <p>13 be an area for agricultural uses?</p> <p>14 A Correct.</p> <p>15 Q Had you known that back in 1983, that your area was</p> <p>16 deemed to be an agricultural area, would that have</p> <p>17 raised any red flags for you, given your definition of</p> <p>18 "agriculture"?</p> <p>19 A No.</p> <p>20 Q So there wouldn't have been any reason for you to</p> <p>21 participate in any of those?</p> <p>22 A No, there wouldn't.</p> <p>23 Q Okay. If you could look at Exhibits 22 and 23</p> <p>24 briefly.</p> <p>25 (Pause)</p>
<p>114</p> <p>1 during this 40-year period that you've lived there</p> <p>2 prior to the Defendant's CAFO being built ever caused</p> <p>3 you to smell a smell of death, as you put it?</p> <p>4 A No. Never.</p> <p>5 Q Nothing that has had the impact that the CAFO has had</p> <p>6 on you and Susan?</p> <p>7 A Never.</p> <p>8 Q Okay.</p> <p>9 A No.</p> <p>10 Q And I believe counsel asked you -- Mr. Braun asked you</p> <p>11 earlier about whether or not you had participated in</p> <p>12 any of the comprehensive planning that had gone on</p> <p>13 since 1983. Do you recall that line of questioning?</p> <p>14 A Yes, I do.</p> <p>15 Q And you testified that you had not participated in any</p> <p>16 of the planning meetings or anything. In fact, you</p> <p>17 didn't even know about it, correct?</p> <p>18 A Correct.</p> <p>19 Q Assuming that, as part of that comprehensive planning,</p> <p>20 the area your property where you live was deemed to be</p> <p>21 an agriculture area, would that have raised concerns</p> <p>22 for you?</p> <p>23 A Oh, yes, it would have raised concern for me if I</p> <p>24 would have known what they were trying to do.</p> <p>25 Q I'm not following.</p>	<p>116</p> <p>1 Q Have you found them?</p> <p>2 A Um-hum, I have.</p> <p>3 Q Okay. So I'm looking at Exhibit 22, and this is a</p> <p>4 letter from Attorney Ben Comer, dated March 1st, 2013</p> <p>5 to -- starts out, "Dear Landowner, please be advised</p> <p>6 that Sam T. Himsel has petitioned the Hendricks County</p> <p>7 Plan Commission for approval of a zoning amendment</p> <p>8 from the current AGR Agriculture, Residential Zoning</p> <p>9 District to the AGI Agriculture Intense Zoning</p> <p>10 District"; do you see that?</p> <p>11 A Yes, I do.</p> <p>12 Q And I believe Mr. Braun asked you whether or not you</p> <p>13 had received this letter, and you said that you had</p> <p>14 not received this letter, correct?</p> <p>15 A That's correct.</p> <p>16 Q And then Mr. Braun asked you -- or pointed out to you</p> <p>17 that at the bottom of that letter it said that written</p> <p>18 comments to the proposal by Sam T. Himsel for the</p> <p>19 rezoning could be filed with the Secretary of the Plan</p> <p>20 Commission. And you testified that you never</p> <p>21 submitted any such comments?</p> <p>22 A That's correct.</p> <p>23 Q But, again, you never received this letter?</p> <p>24 A I never received the letter.</p> <p>25 Q So, that --</p>

<p>121</p> <p>1 Agriculture Intense, right?</p> <p>2 A Correct.</p> <p>3 Q Do you know what your property is zoned as?</p> <p>4 A Well, at the time, it was zoned as Agriculture</p> <p>5 Residential.</p> <p>6 Q Is it now?</p> <p>7 A I'm assuming that it's not Agriculture Intense.</p> <p>8 Q Your property was rezoned?</p> <p>9 A If we fell into that area, I would think it is.</p> <p>10 Q Well, I'm going to represent to you that your property</p> <p>11 was not rezoned.</p> <p>12 A Oh, okay.</p> <p>13 Q Sam Himself's property was rezoned, and we've seen</p> <p>14 that.</p> <p>15 A Okay. Only his property.</p> <p>16 Q That's correct.</p> <p>17 A I was misinformed.</p> <p>18 Q That's all right. At least at the time that Sam</p> <p>19 Himself rezoned -- before the time Sam Himself rezoned</p> <p>20 his property, both your property and Sam Himself's</p> <p>21 property was zoned as Residential. Would that be your</p> <p>22 understanding?</p> <p>23 A Yes.</p> <p>24 Q And that would be consistent with your experience in</p> <p>25 living on your property for the last 40 years, that it</p>	<p>123</p> <p>1 that?</p> <p>2 A Yes.</p> <p>3 Q And would that be consistent with your 40-year</p> <p>4 experience of living in your home, with your</p> <p>5 community, the surrounding area was primarily rural</p> <p>6 residential?</p> <p>7 A Yes.</p> <p>8 Q If you can go to the next page, page 4-5, and this is</p> <p>9 a Table 4.3 for Permitted and Special Exception Uses</p> <p>10 in the Zoning Districts. And you see at the top, the</p> <p>11 two agricultural districts that we've been discussing,</p> <p>12 the AGI Agriculture Intense District and the AGR,</p> <p>13 Agriculture Residential District are listed; do you</p> <p>14 see that?</p> <p>15 A Yes.</p> <p>16 Q And you see on the left, a "P" denotes permitted uses</p> <p>17 within those districts; do you see that?</p> <p>18 A Yes, I do.</p> <p>19 Q Okay. If you could look under the AGI column and go</p> <p>20 down to the listing for CAFO's --</p> <p>21 A Okay.</p> <p>22 Q -- and do you see there's a "P" in that column,</p> <p>23 meaning that's a permitted use in the AGI District; do</p> <p>24 you see that?</p> <p>25 A Yes, I do.</p>
<p>122</p> <p>1 was primarily an ag rural area, correct?</p> <p>2 A Correct.</p> <p>3 Q No CAFO, confined feeding operations were there?</p> <p>4 A Correct.</p> <p>5 Q If you could turn to the next page, page 4-2, and you</p> <p>6 see there's a Table 4.1 labeled "Agricultural and</p> <p>7 Residential Transitional Districts"; do you see that?</p> <p>8 A Yes, I do.</p> <p>9 Q And on the right-hand (sic) column, it states these</p> <p>10 are Previously Established Zoning Districts; and in</p> <p>11 the right-hand column, it is listing Newly Established</p> <p>12 Zoning Districts that come into effect with this 2008</p> <p>13 Ordinance.</p> <p>14 A Okay.</p> <p>15 Q Okay. Do you see that?</p> <p>16 And on the Previously Established Districts, show</p> <p>17 what they were before the 2008 Zoning Ordinance came</p> <p>18 into effect. If you'll notice the AGR Agriculture</p> <p>19 Residential District, do you see that listed there on</p> <p>20 the right-hand column?</p> <p>21 A Yes, I do.</p> <p>22 Q Which is what your property is zoned as, and what Sam</p> <p>23 Himself's property was zoned as.</p> <p>24 A Correct.</p> <p>25 Q But before that, it was rural residential; do you see</p>	<p>124</p> <p>1 Q And if you could look at the AGR, Residential District</p> <p>2 is there a "P" there?</p> <p>3 A No, there isn't.</p> <p>4 Q So, in other words, CAFO's are not permitted in the</p> <p>5 AGR District?</p> <p>6 A That's correct.</p> <p>7 Q And so before Sam Himself rezoned his property, CAFO's</p> <p>8 were not allowed where you live, on his property, and</p> <p>9 not now where you live either, on your property?</p> <p>10 A That's correct.</p> <p>11 Q That would be consistent with your 40-year experience</p> <p>12 that no CAFO's have come in on your property or Sam</p> <p>13 Himself's property, correct?</p> <p>14 A Correct.</p> <p>15 Q If you could go to the next page, which is 4-15, and</p> <p>16 this is Section 4.6 of the Hendricks County Zoning</p> <p>17 Ordinance describing the District intent, County's</p> <p>18 intent for the AGI or agriculture intense district.</p> <p>19 And it says that, "The District serves to provide</p> <p>20 adequate and appropriate locations for intense</p> <p>21 agricultural uses such as CAFO's or agricultural</p> <p>22 businesses that may emit intense odors, vibrations,</p> <p>23 air pollutions, or other disruptions. The intention</p> <p>24 is to protect both the agricultural use and</p> <p>25 residential or commercial property owners from</p>

<p>129</p> <p>1 animal feeding operations?</p> <p>2 A Correct.</p> <p>3 Q If you could look at Exhibit 26.</p> <p>4 (Exhibit 26</p> <p>5 presented to the witness.)</p> <p>6 Q This is the -- this is a partial transcript from the</p> <p>7 March 12th, 2013 hearing before the Hendricks County</p> <p>8 Area Plan Commission on the application of Sam Himsel</p> <p>9 to rezone his property from AGR to AGI; do you see</p> <p>10 that?</p> <p>11 A Yes.</p> <p>12 Q And you testified earlier that you attended this</p> <p>13 hearing, correct?</p> <p>14 A Correct.</p> <p>15 Q And you, I believe, testified that several of your</p> <p>16 neighbors spoke at this hearing, correct?</p> <p>17 A Correct.</p> <p>18 Q If you can look on page 4, you see down at the bottom</p> <p>19 that -- or towards the middle of the page that Richard</p> <p>20 Himsel made a statement; do you see that?</p> <p>21 A Yes, I do.</p> <p>22 Q Do you recall Richard Himsel making a statement before</p> <p>23 the Plan Commission?</p> <p>24 A Yes.</p> <p>25 Q And going to the 5th -- page 5, down at the bottom you</p>	<p>131</p> <p>1 A Um-hum.</p> <p>2 Q -- listed. Do you know who Kevin still is?</p> <p>3 A Yes, I do. He's the President of Midland --</p> <p>4 Co-Alliance LLP.</p> <p>5 Q Do you recall Kevin Still being --</p> <p>6 A Yes.</p> <p>7 Q If you go back to page 4 to Richard Himsel's</p> <p>8 statement, if you could read that to yourself and let</p> <p>9 me know when you're finished.</p> <p>10 A Okay.</p> <p>11 (Pause)</p> <p>12 A Okay.</p> <p>13 Q Is that consistent with your memory of what Mr. Himsel</p> <p>14 stated at the Plan Commission hearing?</p> <p>15 A To my knowledge it is, yes.</p> <p>16 Q Okay. If you go to page 5, he says -- states here,</p> <p>17 "Hog factories have a reputation of smelling and with</p> <p>18 the prevailing winds that come across here 90 percent</p> <p>19 of the time, you'll see how vulnerable we are.</p> <p>20 Nauseous odors are going to be right at our back door</p> <p>21 all the time. I don't think we'll be able to enjoy</p> <p>22 our outside patio or anything, and my wife loves</p> <p>23 flowers"; do you see that?</p> <p>24 A Yes, I do.</p> <p>25 Q Is that consistent with your own experience?</p>
<p>130</p> <p>1 see Debbie Konter listed. Do you recall Debbie Konter</p> <p>2 making a statement at that hearing?</p> <p>3 A Yes.</p> <p>4 Q Going to page 6, you see Mrs. Susan Ebershoff-Coles</p> <p>5 listed there?</p> <p>6 A Yes.</p> <p>7 Q Do you recall her also, just independently?</p> <p>8 A Yes.</p> <p>9 Q We'll go back in a minute. I just want to make sure</p> <p>10 that you remember this as well. If you go to page 11,</p> <p>11 and you see Daryl Stanfield listed on this page?</p> <p>12 A Yes, I do.</p> <p>13 Q Do you recall -- do you know Daryl Stanfield?</p> <p>14 A I only know Daryl Stanfield from this meeting.</p> <p>15 Q Okay. Do you recall him testifying?</p> <p>16 A Yes, I do.</p> <p>17 Q And on the next page, page 12, do you see Wanda</p> <p>18 Stanfield listed?</p> <p>19 A Yes.</p> <p>20 Q Do you recall -- do you know Mrs. Stanfield?</p> <p>21 A Only from the meeting.</p> <p>22 Q But do you recall her?</p> <p>23 A Yes, I do recall her being there.</p> <p>24 Q Going back to -- oh, one more. On page 13, do you see</p> <p>25 Kevin Still --</p>	<p>132</p> <p>1 A Yes, it is. We don't -- we're not able to enjoy the</p> <p>2 outdoors like we used to be able to.</p> <p>3 Q And so, essentially, this concern that Mr. Himsel</p> <p>4 raised came true for you?</p> <p>5 A Yes.</p> <p>6 Q If you could go to page 11?</p> <p>7 (Pause)</p> <p>8 Q The statement that Daryl Stanfield has made here, if</p> <p>9 you could -- that's pretty long. Actually, I'm just</p> <p>10 going to point out a few things. This is a very long</p> <p>11 statement. He says, sort of the beginning, "Animal</p> <p>12 sewage from livestock farms article in the Kalamazoo</p> <p>13 Gazette says that the stench from CAFO's has led to</p> <p>14 reduction of property values up to 70 percent by</p> <p>15 Michigan tax, and nearby residents are no longer able</p> <p>16 to enjoy or sell their homes"; do you see that?</p> <p>17 A Yes, I do.</p> <p>18 Q Do you recall him generally talking about property</p> <p>19 value loss --</p> <p>20 A Yes.</p> <p>21 Q -- in a study or report that he had read?</p> <p>22 A Yes.</p> <p>23 Q If you go down a little bit further, he states,</p> <p>24 "There's another article here that says the real</p> <p>25 estate values for residents close to hogs is</p>

<p>137</p> <p>1 A Correct.</p> <p>2 Q Why have you not contacted any of the Defendants?</p> <p>3 A Because I think that they heard our concerns from the</p> <p>4 very beginning, and any concerns we had going forward</p> <p>5 would not make any difference to them.</p> <p>6 Q So in other words, your community, your neighbors,</p> <p>7 showed up to a public forum, expressed their concerns,</p> <p>8 and yet they went ahead and did this anyway?</p> <p>9 A Absolutely.</p> <p>10 Q So you didn't really see any reason to --</p> <p>11 A Didn't see any reason to move forward and try to talk</p> <p>12 to any of the Himsels whatsoever.</p> <p>13 Q You testified earlier that you have a general</p> <p>14 objection to CAFO's period, you know, just sort of in</p> <p>15 a general sense. I don't want to put words in your</p> <p>16 mouth, but it's something you don't agree with,</p> <p>17 confined animal feeding operations, correct?</p> <p>18 A Correct.</p> <p>19 Q But you never brought suit against other owners of</p> <p>20 another CAFO, correct?</p> <p>21 A Correct.</p> <p>22 Q So having concerns about confined feeding operations</p> <p>23 is not the same as filing a lawsuit; you'd agree with</p> <p>24 that, right?</p> <p>25 A Correct.</p>	<p>139</p> <p>1 Q You weren't planning to move anyway?</p> <p>2 A I was not planning to move anywhere, no.</p> <p>3 Q You'd like to just live in your home of 40 years</p> <p>4 without having to smell death?</p> <p>5 A That's right, absolutely.</p> <p>6 Q You'd like to be able to go outside and have family</p> <p>7 over and enjoy your property that you have worked on</p> <p>8 for 40 years and lived in for 40 years, correct?</p> <p>9 A Absolutely, correct.</p> <p>10 Q Mr. Braun asked you some questions about actions of</p> <p>11 the various individual Defendants, namely Sam, Cory,</p> <p>12 and Clint Himsel acting in their individual</p> <p>13 capacities. And you recall those questions, and I</p> <p>14 objected a lot because I thought those required you to</p> <p>15 engage in legal analysis. So, I'm going to add</p> <p>16 another piece of the legal analysis that he posited to</p> <p>17 you. I believe he said that -- well, and you agreed</p> <p>18 with this, that if an employee works for a corporation</p> <p>19 he's acting on behalf of the corporation. Do you</p> <p>20 recall that testimony?</p> <p>21 A Correct, yes.</p> <p>22 Q If an employee acts -- does something wrong, breaks</p> <p>23 the law, acts illegally in some way while still</p> <p>24 working for the corporation, would you expect that</p> <p>25 that individual would be absolved of accountability or</p>
<p>138</p> <p>1 Q So am I correct to assume that your general objection</p> <p>2 to CAFO's is not the reason, or doesn't have anything</p> <p>3 to do with why you filed -- decided to file this</p> <p>4 lawsuit?</p> <p>5 A Correct.</p> <p>6 Q Mr. Braun asked you some questions about your claim</p> <p>7 for property loss and evidence -- or lack of evidence</p> <p>8 that you personally have, to prove that you have</p> <p>9 suffered a property value loss. Do you recall that</p> <p>10 line of questioning?</p> <p>11 A Yes.</p> <p>12 Q So distinguishing between the County's assessment for</p> <p>13 tax purposes, or an appraisal that you may have had to</p> <p>14 assess the monetary value of your home versus what you</p> <p>15 have testified to as an interference with your ability</p> <p>16 to comfortably live in your home, which of those</p> <p>17 two -- and this is totally a layperson perspective.</p> <p>18 Which of those two do you believe is the thrust of</p> <p>19 your claim with respect to property loss?</p> <p>20 A I think --</p> <p>21 MR. BRAUN: Objection; leading.</p> <p>22 Subject to that, you can answer.</p> <p>23 A Okay. I think the most important of the two is that,</p> <p>24 the inability to live comfortably in your own</p> <p>25 residence.</p>	<p>140</p> <p>1 liability, simply because they're working for the</p> <p>2 corporation?</p> <p>3 MR. BRAUN: Objection; clearly calls for a legal</p> <p>4 conclusion.</p> <p>5 Q Totally just your lay --</p> <p>6 A Not at all.</p> <p>7 Q So in other words, the corporation may or may not be</p> <p>8 held to account for what its employee did, but when an</p> <p>9 employee does something wrong, they're also liable,</p> <p>10 correct?</p> <p>11 A Correct.</p> <p>12 MR. BRAUN: Same objection.</p> <p>13 Q Given that, which was sort of left out of the question</p> <p>14 that you were asked with respect to Clint, Sam, and</p> <p>15 Cory's actions, you said that you weren't aware of</p> <p>16 anything that they had done in their individual</p> <p>17 capacity.</p> <p>18 Given that additional understanding, would you</p> <p>19 change your answer that you didn't have any</p> <p>20 information or any opinion about whether or not they</p> <p>21 had done something individually wrong in this case</p> <p>22 that caused you harm?</p> <p>23 MR. BRAUN: Objection; leading. Calls for a</p> <p>24 legal conclusion.</p> <p>25 A I would agree that if one person of that group or that</p>

<p>149</p> <p>1 the AGR versus AGI, what was the zoning classification</p> <p>2 by which people got CAFO's approved prior to 2008?</p> <p>3 A I don't know.</p> <p>4 Q Are you aware of the Himsels owning any other CAFO's</p> <p>5 other than the one at 4/9 Livestock?</p> <p>6 A Yes.</p> <p>7 Q And have you ever filed an objection or a complaint</p> <p>8 regarding their operation of any of those CAFO's?</p> <p>9 A No.</p> <p>10 Q Do you know whether any of the other CAFO's built by</p> <p>11 the Himsel family were built before or after 2008?</p> <p>12 A No, I do not know that.</p> <p>13 Q That's all the questions I have. Thank you.</p> <p>14 MS. FERRARO: I think we're done.</p> <p>15 VIDEOGRAPHER: This concludes the videotaped</p> <p>16 deposition of Robert Lannon taken on May 26th, 2016.</p> <p>17 The current local time is 2:23 p.m. and we are off the</p> <p>18 record.</p> <p>19</p> <p>20 AND FURTHER THE DEPONENT SAITH NOT.</p> <p>21</p> <p>22</p> <p>23 ROBERT LANNON</p> <p>24 END TIME: 2:23 P.M.</p> <p>25</p>	<p>151</p> <p>1 that I am not in the employ of the attorneys for any</p> <p>2 party.</p> <p>3 IN WITNESS WHEREOF, I have hereunto set my hand</p> <p>4 this 10th day of June, 2016.</p> <p>5</p> <p>6</p> <p>7 <i>Karen Keim</i></p> <p>8</p> <p>9 Karen K. Keim</p> <p>10 Certified Realtime Reporter</p> <p>11 Illinois CSR No. 84-1577</p> <p>12 Missouri CCR No. 1328</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>150</p> <p>1 STATE OF INDIANA)</p> <p>2)</p> <p>3 COUNTY OF MARION)</p> <p>4</p> <p>5 I, Karen K. Keim, CRR, RPR, CSR-IL, CCR-MO,</p> <p>6 Notary Public, do hereby certify that ROBERT LANNON,</p> <p>7 the deponent herein, was first duly sworn to tell the</p> <p>8 truth, the whole truth, and nothing but the truth in</p> <p>9 the aforementioned matter;</p> <p>10 That the foregoing deposition was taken on</p> <p>11 behalf of the Defendants, at the Harrington Law, P.C.,</p> <p>12 105 North Washington Street, Danville, Indiana, on May</p> <p>13 26, 2016, pursuant to the Indiana Rules of Trial</p> <p>14 Procedure;</p> <p>15 That said deposition was taken down in</p> <p>16 stenograph notes and afterwards reduced to typewriting</p> <p>17 under my direction, and that the typewritten</p> <p>18 transcript is a true record of the testimony given by</p> <p>19 the said deponent; and that signature was reserved by</p> <p>20 the deponent and all parties present;</p> <p>21 That the parties were represented by their</p> <p>22 counsel as aforementioned.</p> <p>23 I do further certify that I am a</p> <p>24 disinterested person in this cause of action, that I</p> <p>25 am not a relative or attorney of either party or</p> <p>otherwise interested in the event of this action; and</p>	

Robert Lannon
May 26, 2016

149

149

1 the AGR versus AGI, what was the zoning classification
2 by which people got CAFO's approved prior to 2008?

3 A I don't know.

4 Q Are you aware of the Himsels owning any other CAFO's
5 other than the one at 4/9 Livestock?

6 A Yes.

7 Q And have you ever filed an objection or a complaint
8 regarding their operation of any of those CAFO's?

9 A No.

10 Q Do you know whether any of the other CAFO's built by
11 the Himsel family were built before or after 2008?

12 A No, I do not know that.

13 Q That's all the questions I have. Thank you.

14 MS. FERRARO: I think we're done.

15 VIDEOGRAPHER: This concludes the videotaped
16 deposition of Robert Lannon taken on May 26th, 2016.
17 The current local time is 2:23 p.m. and we are off the
18 record.

19

20 AND FURTHER THE DEPONENT SAITH NOT.

21

22


23

ROBERT LANNON

24 END TIME: 2:23 P.M.

25

App. 125

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STATE OF INDIANA)	IN THE HENDRICKS SUPERIOR COURT
) SS:	
HENDRICKS COUNTY)	CAUSE NO. 32D04-1510-PL-000150
MARTIN RICHARD HIMSEL, JANET L.)	
HIMSEL, ROBERT J. LANNON, and)	
SUSAN M. LANNON,)	
)	
Plaintiffs,)	
)	
v.)	
)	
SAMUEL T. HIMSEL, CORY M.)	
HIMSEL, CLINTON S. HIMSEL,)	
4/9 LIVESTOCK, LLC, and)	
CO-ALLIANCE, LLP,)	
)	
Defendants.)	

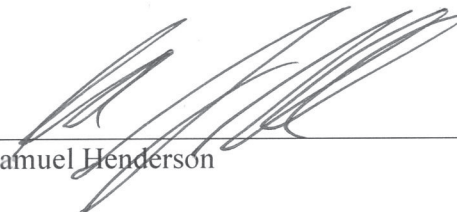
AFFIDAVIT OF SAMUEL HENDERSON

I, Samuel Henderson, hereby affirm under penalty of perjury that:

1. I am one of Plaintiffs' counsel in this case.
2. On December 13, 2016, I visited the Bureau of Labor Statistics CPI calculator webpage in my Firefox web browser, at the URL <https://data.bls.gov/cgi-bin/cpicalc.pl>. I entered the values in the form that are shown in the attached screenshot, to wit 1971 and \$22,100.
3. Upon submitting the form, I took the screenshot to which this affidavit is attached.
4. The screenshot accurately represents the website as it appeared in my browser at that time.
5. The website bore the official insignia of the Bureau of Labor Statistics, and showed no sign of tampering.

I verify under penalty of perjury that the above facts are true to the best of my knowledge and belief.

Date: Jan. 20, 2017


 Samuel Henderson

Effective Date: October 1, 2008

THE HENDRICKS COUNTY QUALITY GROWTH STRATEGY

ZONING ORDINANCE



Prepared with the assistance of:

RATIO Architects Inc.

The Planning Workshop

- D. SUBDIVISION OF LAND.** The subdivision of land in every zoning district shall be consistent with the provision and requirement of the Hendricks County Subdivision Control Ordinance, as amended.

4.2 ZONING DISTRICT TRANSITION

- A. The zoning districts, as established by this Ordinance, differ from previously established zoning districts in the Hendricks County Zoning Ordinance dated 2001. Each of the districts has either been combined with other districts, removed, remains the same, or is a newly added district. Table 4.1: Agricultural and Residential Transitional Districts and Table 4.2: Non-Residential/ Non-Agricultural Transitional Districts shall apply for all district interpretations regarding previously and newly established zoning districts.

Table 4.1 : Agricultural and Residential Transitional Districts	
Previously Established Zoning Districts	Newly Established Zoning Districts
AG Agricultural District	(Remove)
AG-B Agricultural Business District	AGB Agricultural Business District
(New)	AGI Agriculture, Intense District
R-A Rural Residential District	AGR Agriculture, Residential District
R-AA Single-family (15,000) Residential District	RA Single-family Residential District
R-B Single-family (12,500) Residential District	RB Single-family Residential District
R-C Single-family (10,000) Residential District	RC Single-family Residential District
R-D Single-family (7,500) Residential Districts	RD Single-family Residential Districts
R-E Multi-Family (6) Residential District	RE Multi-Family Residential District
R-F Multi-Family (12) Residential District	
MHP Mobile Home Park District	MHP Manufactured Home Park District

A. DISTRICT INTENT:

The Agriculture Intense (AGI) District serves to provide adequate and appropriate locations for intense agricultural uses such as CAFO's or agricultural businesses that may emit intense odors, vibrations, air pollution, or other disruptions. The intention is to protect both the agricultural use and residential or commercial property owners from nuisance claims.

B. PERMITTED USES

Agricultural

agricultural use, low intensity
agricultural chemical sales,
distribution, & storage
agricultural processing, minor
animal boarding/stables
(excluding kennels)
farm co-op. facility
farmer's market
winery
agricultural processing, major
CAFO
CFO (confined feeding
operation)
livestock auction/sales facility

Residential

dwelling, single-family
(excluding major residential
plats)

Communications / Utilities

essential services, minor
wind energy conversion systems

Parks & Recreation

nature preserve

C. SPECIAL EXCEPTION

Communications / Utilities

essential services, major
wireless communications
facilities

Institutional

bus/train terminal
publicly-owned buildings and
facilities

NOTES:

1. Applicants for a special exception use in this district shall be required to sign the following agricultural clause and record it as a deed restriction to bind successive owners:

"Grantee and their successors in title are on notice and understand that this residence is being built in a predominantly agricultural area and agricultural operations will occur in the vicinity. With this understanding, the grantee and successors in title forgo their right to bring claim against any agricultural operator in the area who has not been negligent."
2. All agricultural structures shall require an Improvement Location Permit and shall submit a plot plan as described in [Subsection 12.10\(C\)](#) to ensure that encroachment into designated floodplains, easements, public right-of-way, or other non-buildable areas does not occur.

A. DISTRICT INTENT:

The intent of the Agriculture Residential (AGR) District is to permit the establishment of individual single-family dwellings while maintaining a primarily rural character. This can serve to protect land best suited for agricultural use from the encroachment of incompatible land uses.

B. PERMITTED USES

Agricultural

agricultural use, low intensity
agricultural entertainment
agricultural processing, minor
greenhouse (on-site plant sales)

Residential

dwelling, single-family
group home / residential facility
home occupation

Communications / Utilities

essential services, minor
wind energy conversion systems

Parks & Recreation

nature preserve
recreation (passive)

C. SPECIAL EXCEPTION

Agricultural

animal boarding/stables
(excluding kennels)
farmer's market
winery

Residential

bed and breakfast
establishments
boarding house
dwelling, accessory apartment
dwelling, manufactured housing
(single unit)
home business
kennel, private

Communications / Utilities

essential services, major
wireless communications
facilities

Institutional

educational inst, excluding p-
12, public
educational inst, p-12 only,
public
educational inst, p-12 only,
private
airport, private
bus/train terminal
cemeteries
community center

penal or correctional institution,
private
places of worship
publicly-owned buildings and
facilities

Parks & Recreation

campground / rv park
driving range (as a primary use)
golf course
recreation (active)

Commercial

banquet or assembly hall
entertainment, commercial
outdoor
entertainment complex
retreat center
veterinarian clinics and animal
hospitals

Light and Heavy Industrial

composting facility
mineral extraction operations (in
urban areas as defined by IC
36-7-4-1103)

NOTES:

1. Major Plat, with the exception of Major Plats designated by the Plan Commission as an Estate Subdivision or a Conservation Subdivision, are prohibited within the AGR District.
2. Some uses in this district may be required to sign the following agricultural clause and record it as a deed restriction to bind successive owners:

"Grantee and their successors in title are on notice and understand that this residence is being built in a predominantly agricultural area and agricultural use, low intensity, will occur in the vicinity. With this understanding, the grantee and successors in title forgo their right to bring claim against any agricultural operator in the area who has not been negligent."
3. All agricultural structures shall require an Improvement Location Permit and shall submit a plot plan as described in Subsection 12.10(C) to ensure that encroachment into designated floodplains, easements, public right-of-way, or other non-buildable areas does not occur.

STATE OF INDIANA	)		IN THE HENDRICKS SUPERIOR COURT
	)	SS:	
COUNTY OF HENDRICKS	)		CAUSE NO. 32D04-1510-PL-000150
MARTIN RICHARD HIMSEL, JANET L.)		
HIMSEL, ROBERT J. LANNON and SUSAN M.)		
LANNON,)		
)		
Plaintiffs,)		
)		
vs.)		
)		
SAMUEL T. HIMSEL, CORY M. HIMSEL,)		
CLINTON S. HIMSEL, 4/9 LIVESTOCK, LLC,)		
and CO-ALLIANCE, LLP,)		
)		
Defendants.)		

AFFIDAVIT OF NICK A. TILLEMA

I, NICK A. TILLEMA, declare under penalty of perjury as follows:

1. My name is Nick A. Tillema. I am a Certified General Appraiser (CG 69100358) in the State of Indiana and have been involved in the valuing of property with environmental contamination for over fifteen years. I have written a seminar for a national professional organization (The Appraisal Institute) that was marketed on a nationwide basis and is called "Introduction to Environmental Issues for Real Estate Appraisers." I have taught this seminar and "Appraising Environmentally Contaminated Properties: Understanding and Evaluating Stigma," "Analyzing the Effects of Environmental Contamination on Real Property," and "Valuation of Detrimental Conditions in Real Estate," nationally. A copy of my curriculum vitae is attached.

2. I was retained by Kim Ferraro, Senior Attorney at the Hoosier Environmental Council, to assess the diminished value, if any, of the residential properties located at 3581 West County Road 350 North, Danville, Indiana and 3868 West County Road 350 North, Danville, Indiana due to the Confined Animal Feeding Operation ("the CAFO") situated at 3042 North 425 West, Danville, Indiana.

3. In conducting the assessment, I reviewed relevant case documents, conducted a literature review, inspected the at-issue properties, researched data concerning property sales, and reached certain opinions and conclusions as set forth in my report entitled, "Market Valuation Analysis," which is incorporated by reference as is fully stated herein.

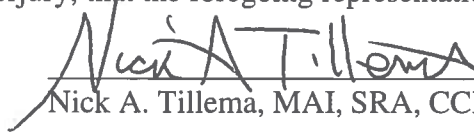
4. As detailed in my attached report, it is my professional opinion based on the information I reviewed and my education, training and experience, that the subject properties have an estimated value loss due to the presence of the CAFO as follows:

3868 West County Road 350 North: \$77,000 representing a 60.0% loss in value;

3581 West County Road 350 North: \$178,800 representing a 49.5% loss in value.

I affirm, under the penalties for perjury, that the foregoing representation(s) are true.

Date: 12-12-2016



Nick A. Tillema, MAI, SRA, CCIM, AI-GRS, AI-RRS

Market Valuation Analysis

Diminishment Factor involving the properties located at
3581 West 350 North, Danville, Indiana (Himsel, Richard & Janet)
3868 West 350 North (Lannon, Robert & Susan)

Introduction

My name is Nick A. Tillema. I am a Certified General Appraiser (CG 69100358) in the State of Indiana and have been involved in the valuing of property with environmental contamination for over fifteen years. I have written a seminar for a national professional organization (The Appraisal Institute) that was marketed on a nationwide basis and is called "Introduction to Environmental Issues for Real Estate Appraisers." I have taught this seminar and "Appraising Environmentally Contaminated Properties: Understanding and Evaluating Stigma," "Analyzing the Effects of Environmental Contamination on Real Property," and "Valuation of Detrimental Conditions in Real Estate," nationally. A copy of my curriculum vitae is attached as Exhibit A.

I have been retained by Ms. Kim Ferraro, Senior Attorney at the Hoosier Environmental Council, as an appraiser consultant to provide an opinion as to the diminished value, if any, of the residential properties located at 3581 West County Road 350 North, Danville, Indiana and 3868 West County Road 350 North, Danville, Indiana. The sites are adjacent to a Confined Animal Feeding Operation (CAFO) situated at 3042 North 425 West, Danville, Indiana.

Historical Data

The area of concern is the properties within the immediate radius of the CAFO located at 3042 North 425 West, Danville, Indiana. It is generally located within the northwestern part of Hendricks County – approximately 6 miles southeast of North Salem, Indiana; 6.5 miles northwest of Danville and approximately 35 miles due west of Indianapolis. The immediate neighborhood is agricultural in nature and is more specifically defined as being bound by the McCloud Nature Park to the west; the Hendricks County Line to the north; U.S. 36 to the south; and State Road 39 to the east. Home sites and farming operations within the defined neighborhood range in age from those built in the early 1900's to the late-1900's – many of which have been remodeled within the last decade. The CAFO in question is located near the center of the defined neighborhood.

There are no formal records within Indiana Department of Environmental Management (IDEM) regarding either of the subject residential properties. However, there are IDEM records pertaining to the CAFO including an application dated April 19, 2013 to IDEM requesting permission to construct a "new confined feeding operation" at 3042 North County Road 425 West, Danville in Hendricks County. The application indicates that all manure concrete structures would be built in accordance with the NRCS National Engineering Manual and Conservation Practice Standards.

The application also indicates that the operation includes two 33,500 square foot buildings holding 4,000 hogs each – both with slatted floors and ventilation fans. It also includes two concrete pits underneath the buildings to collect and store over four million gallons of liquid hog waste. The operation also includes sufficient land to spread the waste through the "drag line" or "hose" method – a technique by which manure is pumped to a nearby field and injected 4 to 6 inches into the ground with knives mounted on a bar behind a tractor.

Such an operation would come under the classification of a Confined Animal Feeding Operation (CAFO). A notarized copy of the Confined Feeding Operation Completed Construction Affidavit was filed on September 23, 2013. And, according to IDEM inspection reports, the first round of pigs was introduced on October 6, 2013 and the first annual manure spread was planned October 6, 2014.

Unfortunately, the site is approximately 1,400 feet southwest of the home site of Martin R. and Janet L. Himsel located at 3581 West County Road 350 North – a 26-acre farm where Richard Himsel was born and where Richard and Janet Himsel have been living since 1994. It is also approximately 2,500 feet southwest of the residence owned by Robert J. and Susan M. Lannon situated at 3868 West County Road 350 North, Danville, IN where the Lannons have lived since 1971. Prevailing winds in this area are from southwest to northeast thereby placing both residences not only within extremely close proximity but downwind to the odor of 8,000 hogs' waste.

Litigation involving the stench, contamination, and nuisance of the facility was filed with the Hendricks Superior Court on October 6, 2015. Part of the allegations expressed within the filings is that the value of the two residential properties located at 3581 West County Road 350 North, Danville, Indiana and 3868 West County Road 350 North Danville, Indiana have been damaged by the existence of the CAFO.

Issue

As of the effective date of this appraisal, are the contamination problems associated with the CAFO substantial enough to lessen the property values of the Himsels' and Lannons' residential properties and, if so, to what degree.

General Considerations

Livestock farming has undergone a dramatic transformation in the past several decades. Although much of the production had centered on smaller, family-owned farms, it has now shifted to large farms that often have corporate contracts. Most meat and dairy products now are produced on large farms with specially designed buildings. In the process, livestock, dairy, poultry and egg production has apparently become more efficient. General improvements to mechanical devices, animal breeding, and the specially formulated feeds have all increased the efficiency and productivity of animal agriculture.

Paramount within that shift is the introduction of the Concentrated Animal Feeding Operation (CAFO) - a specific type of large-scale industrial livestock production facility that raises animals, usually in high numbers and at high-density. To be considered a CAFO, a farm must first be categorized as an animal feeding operation (AFO) - a lot or facility where animals are kept confined and fed or maintained for 45 or more days per year. (Environmental Protection Agency [EPA], 2009). AFOs that meet the definition of CAFO under federal regulations are considered "point sources" and subject to permitting requirements of the Clean Water Act's National Pollution Discharge Elimination System (NPDES).¹ In Indiana, IDEM has authority to implement and enforce the federal NPDES permitting programs including those requirements applicable to CAFO's. Generally, under EPA regulation, a CAFO is defined to include any AFO that confines more than a specified number of animals or, regardless of the animal threshold, is designated a "significant contributor of pollutants" to waters of the U.S. by the NPDES permitting authority.²

¹ 40 CFR 122.23

² *Id.*

Although CAFOs can provide an economical basis for eggs, meat and milk, they have done so at considerable expense. Pollutants include large measures of biological waste, air pollutants – including ammonia, hydrogen sulfide, methane, nitrous oxide, and volatile organic compounds. Such farms are notorious for noxious odors. Daily manure production from a facility of 8,000 hogs can generate about 38,000 gallons of waste and a concentration of odor that can be dramatic. Air emissions from CAFOs usually come from one of three main sources: the ventilation stacks of the barns, manure lagoons, and from the manure spread on fields. However, agriculture is exempt under the Clean Air Act from having to comply with air quality standards and Indiana does not regulate odors or air emissions from CAFOs.

Spreading manure over nearby fields has long been a recognized as a basic fertilization technique and, within the last several decades, has been considered preferable in an effort by farmers to contain fertilizer costs, move away from chemical applications, designate a specific use for the waste product, and increase crop productions. However, manure applied too frequently or in too large of a quantity, will allow the nutrients to overwhelm the absorptive capacity of the soil. Such conditions lead to either a run off to neighboring properties or the pollutants are leached into the groundwater.

Basically, the dilatory effects on the immediate neighboring properties include:

- Groundwater leaching because of improperly spread manure, runoff from land applications, and/or leaking containments facilities.
- Surface Water in which CAFOs pollute lakes, rivers, and reservoirs by runoff and floods.
- Typical air borne pollutants surrounding CAFOs include ammonia, hydrogen sulfide, methane, and particulate matter – all of which have varying health risks.
- Depending on such things as weather conditions, prevailing winds, and farming techniques, CAFO odors can reach as far as 5 or 6 miles.
- House flies, stable flies, and mosquitoes are common insects associated with CAFOs and generally breed in decaying material and standing water. Residence units that are close to the feeding operations experience a much higher fly population than average homes.
- CAFOs are major source of pathogens which consist of parasites, bacterium, and/or viruses – all of which are capable of causing disease or infection in animals or humans. There are over 150 pathogens in manure that could impact human health. Many of these pathogens are concerning because they can cause severe diarrhea.
- Antibiotics are commonly administered to animal feed to reduce the livestock's chance for infection and to help reduce sickness disease in situations in which large numbers of animals are contained within close quarters. Continued use seems to contribute to an increase in antibiotic-resistant microbes causing antibiotics to be less effective in humans.
- Property values – There is evidence that property values drop significantly with the most certain fact being that the closer a home is to a CAFO, the more certain will be the value loss.

Property value losses vary based on several criteria but proximity and whether upwind or downwind are the two major factors. Generally, a safe property and a contaminated property perceived as safe can be sold at full market value. But both contaminated and non-contaminated properties may lose value or marketability when the public perceives there to be a physical or financial threat. Whether this public perception is founded or reasonable is irrelevant because the public's apprehension drives market value.

Properties perceived to be contaminated create an uncertainty over future additional cleanup obligations. Properties within close proximity to a CAFO is typically perceived to be subject to odor problems – especially if downwind from such a facility.

“The exact impact of CAFOs fluctuates depending on location and local specifics. Studies have found differing results of rates of property value decrease. One study shows that property value declines can range from a decrease of 6.6% within a 3-mile radius of a CAFO to an 88% decrease within 1/10 of a mile from a CAFO (Dakota Rural Action, 2006). Another study found that negative effects are largest for properties that are downwind and closest to livestock (Herriges, Secchi, & Babcock, 2005). The size and type of the feeding operation can affect property value as well. Decreases in property values can also cause property taxes to drop, which can place stress on local government budgets.”³

Valuation Considerations

Property damage resulting from CAFO’s has been a topic of professional journalism for many years. One of the premier works on property value damage is by Randall Bell, PhD, MAI in his book, ***Real Estate Damages***. The work classifies such pollutants as an external condition which value loss is determined by paired sales analysis or regression analysis. Unfortunately, sales of residential properties within proximity to such facilities are rare.

John A. Kilpatrick, PhD, MAI, the managing director of Greenfield Adviser, has produced an article for the Appraisal Institute’s *The Appraisal Journal* in the Winter Edition of 2015 entitled ***Animal Operations and Residential Property Values***, in which he details dozens of national studies that indicate the existence and extent of property damage associated with a CAFO. He further presents a series of case studies that document the impacts of such operations.

Kilpatrick indicates that property values are impacted as market participants view the CAFO as a negative externality that, unlike other forms of obsolescence, cannot be remediated by the property owner. It is not typically considered economically curable under generally accepted appraisal theory and practice. His studies conclude that “Overall, the empirical evidence indicates that residences near AOs are significantly affected and data seems to suggest a valuation impact of up to 26% for nearby properties, depending on distance, wind direction, and other factors. Further, there has been some suggestion that properties immediately abutting an AO can be diminished as much as 88%.”⁴

³ ©2010 National Association of Local Boards of Health, Bowling Green, Ohio. By Carrie Hribar, MA,

⁴ Animal operations and Residential Property Values, by John A. Kilpatrick, PhD, MAI, *The Appraisal Journal*, Winter 2015, p 41.

A summary of the studies Kilpatrick cites within the article is as follows⁵:

Case Study	Value Loss	Remarks
Ables-Allison and Connor (1990)	\$430 within 5 miles	Greatest impact within 1.6 miles
Taff, Tiffany, and Weisberg (1996)	N/A	AO sited near older, less-expensive homes
Palmquist, Roka, and Vukina (1997)	9%	Average up to 2 miles
Hamed Johnson, and Miller (1999)	6.6%–88%	Largest loss if within 0.10 mile
ABA Presentation (1999)	N/A	Confirmed respiratory problems
Central Industries (2000)	60% for farms closest to plant	USD0J cases, values by appraisal
Beasley (2001)	Up to 30%	Impacts 10% at 1.5 miles
Aiken (2002)	30% @ 0.75 mile	Confirmed by court and local appraiser
Spears (2003)	N/A	40 km of beaches closed due to AO emissions
Herriges, Secchi, and Babcock (2003)	26% at 0.25 mile	Moderate-size AO, 6% at 1.5 miles
Weida (2004)	40% at 0.50 mile	10% at 2 miles
Ready and Abdalla (2005)	Residence at 0.25 mile > 6.4% Residence at 0.50 mile 4.1%	Roughly half the impact of a landfill
Kim and Goldsmith (2008)	23.5% at 1 mile	18% average within 3-mile radius
Isakson and Ecker (2008)	44%	Directly downwind and within 2 miles

Source: Catherine M. H. Keske, "Determining the Economic Feasibility of Anaerobic Digestion in Colorado: Guidelines for Animal Farm Producers," CSU Extension Fact Sheet 1.229 (2012).

Additionally, Kilpatrick illustrates the growing trend within the property tax assessment community to recognize value loss of residential units that are within close proximity to containment farms. A survey to illustrate property tax reduction in areas around Animal Operations shows the following⁶:

Area	Amount of Reduction	Property Type
Grundy Co, MO	30%	
Mecosta Co, MI initially:	35%	Dwellings only
later changed to:	20%	Land and structures
Midland Co, MI	20%	
DeWitt Co, IL	30%	
McLean Co, IL	35%	
DeKalb Co, AL	Base reassessment, variable rates	
Renville Co, MN	Base reassessment, variable rates	Dwellings only
Humbolt Co, IA	20%-40%	Dwellings only
Frederick Co, MD	10%	
Muhlenberg Co, KY	18%	Dwellings only

⁵ Ibid, p. 48

⁶ Ibid, p. 46

He further cites court awarded damages within the litigation community as follows:

Year/State	Jury Award	Case/Remarks
1991/NE	\$375,600	<i>Kopecky v. National Farms</i> , swine operation
1996/KS	\$12,100	Swine settlement – parties undisclosed in news article
1998/KS	> \$15,000	<i>Twietmeyer v. Blocker</i> , beef operations
1999/MO	\$5,200,000	<i>Hanes v. Continental Grain</i> , swine operation
2001/OH	\$19,182,483	<i>Seelke v. Buckey Egg Farm</i> , poultry
2002/IA	\$33,065,000	<i>Blass v. Iowa Select Farms</i> , swine operation
2004/OH	\$50,000,000	<i>Bear v. Buckey Egg Farm</i> , poultry
2006/AL	\$100,000	<i>Sierra Club v. Whitaker</i> , swine
2006/MO	\$4,500,000	<i>Turner v. Premium Standard Farms</i> , swine
2007/IL	\$27,000	State of Illinois (respondent unreported), swine

Source: Catherine M. H. Keske, "Determining the Economic Feasibility of Anaerobic Digestion in Colorado: Guidelines for Animal Farm Producers," CSU Extension Fact Sheet 1.229 (2012).

In addition, an article written by Hans R. Isakson and Mark D. Ecker of the University of Northern Iowa (released April 21, 2008 in *Agricultural Economics*, Volume 39, Issue 3, pages 365-372) followed the impact of 39 swine confinement operations and 5,822 home sales in Black Hawk County, Iowa and explored, among other things, the variable that captured the effect of prevailing winds. The article acknowledges that the "impact on houses located very close (within two miles) to a CAFO is extremely difficult to determine because so little data are available."

They did, however, determine the loss of value is directly related to the subject property's relationship to the prevailing winds. "Houses directly downwind and within two miles of a CAFO can suffer as much as a 44.1 percent loss in value".⁷

And, finally, a study entitled "The Effect of Regulated Livestock Operations on Property Values in Selected Indiana Counties" was prepared by the Indiana Business Research Center and published in September of 2008. The study, using regression analysis showed there are several statistically significant effects on the property value of residential properties near CAFO – including the damaged property's distance from the CAFO, the prevailing wind direction, town versus non-town units, and the number of animal units. Again, damage of residential units within one half mile from the CAFO were difficult to pinpoint because of the lack of such data. The report states "To place these results in perspective, consider that two-thirds of all property sales are within three miles of an RLO, but few properties (707 or 9.0 percent) are within one mile."⁸

⁷ **An Analysis of the Impact of Swine CAFOs on the Value of Nearby Houses**, *Agricultural Economics*, Volume 39, Issue 3, p. 370

⁸ **The Effect of Regulated Livestock Operations on Property Values in Selected Indiana Counties**, Indiana Business Research Center, September 2008, p. 38.

Value Analysis

It is evident and acknowledged that the source for the odor problem on the two residential units in question is the neighboring property at 3042 North County Road 425 West, Danville, Indiana. There appears to be no alternative uses for either residential units in which the odor is not a concern unless the CAFO was abandoned and, even then, the stench would prevail for a period of time.

All of the other residential properties in the neighborhood have been affected to one degree or another but the two subject properties are some of the closest and both are downwind of this area's prevailing winds. Based on the perception in the local market, the overall stigma of the neighborhood is considered as severe.

COST APPROACH

The Cost Approach is where a value indication is derived by adding the estimated current cost of replacing (or reproducing) the improvement - less any loss in value from depreciation - to the estimated value of the land as though it were vacant. In this case, land value would have been effected because of the limitation on the use, i.e., a typical buyer would not purchase the lot as vacant to build a home. And improvement value would have been diminished because the owners have now realized a limitation of their right of enjoyment.

Land value in these cases have been diminished because, given the choice between two vacant land properties that are similar in all respects except that one is a typical unit and the other has an odor concern like that of the subject properties, a typical buyer would purchase the tract with a clean record. Diminishment in land value is measured by finding an alternative use that such a property could sustain and estimating the market value of the tract under such a limitation.

The improvement value diminishment is measured by an increase in depreciation - both physical curable and economic obsolescence. Physical curable is increased because maintenance of the premises requires elimination or containment of the odor and a constant monitoring of the groundwater. Economic obsolescence is increased because a loss has occurred due to the loss of enjoyment based on factors outside of the property line.

This report addresses the value loss due to contamination associated with the property. There are improvements on the property but they would not generally be valued via the cost approach, therefore, the cost approach is not applicable.

SALES COMPARISON APPROACH

The Sales Comparison Approach is derived by analyzing recent sales of comparable properties in the market. Evaluating the effects of contamination on value requires a study of the market behavior and a search for signs of evidence in the market. Each comparable situation has a different set of facts that lead to a loss in value conclusion and each must be analyzed as it relates to the circumstances surrounding the subject. The process is similar to that of a location adjustment.

Damages from the noxious CAFO waste are made evident by the Sales Comparison Approach although slightly different for each of the two properties involved. The first unit is the 26.66-acre tract with an old house and includes several farming outbuildings. It is apparent that the tract was cut from what was once a large farm leaving an unusually shaped tract with very little tillable acreage. The second is a typical brick ranch home situated on a small lot that was once part of a farm tract as well. Both are attractive to the typical buyer but neither are attractive to the same group of typical buyers.

3581 West County Road 350 North, Danville, Indiana:

It is relatively obvious that this 26.6-acre tract was once part of a larger farming operation in which the productive farm ground was sold leaving this residential tract and outbuildings intact. If valuing this property under the hypothetical condition that it was not subject to the odor problem, the Highest and Best Use as if vacant would be for the continued use of its current usage – pasture land with supporting outbuildings. No alternative use could bear a larger value than how it is currently being employed.

Therefore, the value of the 26.66-acre tract as if it were vacant would be the same whether it had an odor issue or not. If vacant, an investor would employ the outbuildings and land to cultivate livestock production. Its value of the land as if vacant, according to the following grid, is approximately \$138,619 or \$5,211 per acre.

	Subject	Comparable Sale #1	Comparable Sale #2	Comparable Sale #3
Address	3581 West CR 350 N	3100 South CR 800 West	1701 North CR 300 East	700 North CR 300 East
City	Danville, IN	Coatsville, IN	Danville, IN	Danville, IN
Proximity to Subject	N/A	10.0 miles	10.2 miles	7.5 miles
Data Source	N/A	Data Files	Data Files	Data Files
Verification Source	Personal Inspection	MLS #21152570	MLS #21378274	MLS #21248582
Sales Price	N/A	\$ 162,000	\$ 197,068	\$ 380,000
Price Per Acre	N/A	\$ 5,400	\$ 5,351	\$ 9,179
Rights Transferred	Fee	Fee	Fee	Fee
Financing	Cash, Conventional	Cash	Conventional	Cash
Condition of Sale	Arm's Length	Arm's Length	Arm's Length	Arm's Length
Date of Sale (+ 2% per year)	Oct-16	Feb-12	12/19/21-5	Oct-13
Current Cash Equivalent	Revised \$/Acre	\$ 5,697	\$ 5,422	\$ 9,729
Location	Rural Hendricks County	Rural Hendricks County	Rural Boone County	Suburban Danville
Site Size (acres)	26.66	30.00	36.83	41.40
Tillable Acres	9.00	26.00 (1,000)	29.80 (1,000)	38.00 (1,000)
Zoning	Agriculture	Agriculture	Agriculture	Agriculture
Utilities	Private	Private	Private	Private
Topography	Flat	Flat	Flat	Flat
Access	Average	Average	Average	Similar
Flood Zone	None (18063C9140D)	None (18063C0225D)	None (18063C0162D)	None (18063C0143D)
Appeal	Average	Average	Average	Average
Creek	Yes	None	Yes	No
Woods	1 Acre	4 acres	7 acres	None
Improvements	Farm Outbuildings	None	Farm Outbuildings	Superior Buildings
Condition	Average			
Net Adjustment		(250)	(1,000)	(4,000)
Indicated Value/Acre		\$ 5,447	\$ 4,422	\$ 5,729
Indicated Value (Site Size x Indicated Value/Acre)		\$ 145,217	\$ 117,891	\$ 152,748
Indicated Value	\$ 138,619			

The value of the total tract – including the house, outbuildings and the 26.66-acre tract “As-if Not Contaminated” would be calculated by finding the recent sales of similar type and sized tracts of land with older homes and outbuildings. The following sales reflect properties with the same factors and amenities the typical buyers would find in this market.

3581 W 350 N Address Danville, IN 46122				7867 S State Road 267 Plainfield, IN 46168				8147 North CR 21 West North Salem, IN				6242 E County Road 100 S Fillmore, IN 46128			
Proximity to Subject				19.0 miles				4.8 miles				20.5 miles			
Sales Price				\$ 0				\$ 350,000				\$ 365,000			
Price/Gross Living Area				\$ 196.19				\$ 153.62				\$ 110.37			
Data & Verification Sources				BLC/PublicRcrd BLC#21382205/DOM 6				BLC#21403421/DOM 88				BLC#21341828/DOM 151			
VALUE ADJUSTMENTS				DESCRIPTION DESCRIPTION +(-)\$ Adjust.				DESCRIPTION DESCRIPTION +(-)\$ Adjust.				DESCRIPTION DESCRIPTION +(-)\$ Adjust.			
Sales or Financing Concessions				Arms Length/Cash No Assistance				Arms Length/Cash No Assistance				Arms Length/IHFA No Assistance			
Date of Sale/Time				11/30/2015				5/24/2016				8/18/2015			
Location				Rural				Rural				Rural			
Site				26.66 (8 tillable)				27.50 (21 tillable)				20.67(0 tillable)			
View				Agriculture/Pond				Agriculture/Woods				Agriculture/Creek			
Design (Style)				Cape Cod/Vinyl				Traditional/Brick				Traditional/Brick			
Actual Age (Yrs.)				90				75				116			
Condition				Average				Average				Average			
Above Grade				Total Bdrms Baths				Total Bdrms Baths				Total Bdrms Baths			
Room Count				7 4 2.0				8 3 2.0				9 4 4.0			
Gross Living Area				1,960 Sq. Ft.				2,376 Sq. Ft.				3,239 Sq. Ft.			
Basement & Finished Rooms Below Grade				Partial Basement Unfinished				Full Basement Unfinished				Full Basement Finished			
Garage/Carport				1 Dtchd/3 Dtchd				1 Atchd/3 Dtchd G				2 Dtchd G			
Fireplace				0 Fireplace				0 Fireplace				0 Fireplace			
Fence/Outbuilding				Patios/Outblding				Patios/Outbuilding				Deck/Outbuildings			
Net Adj. (total)				+ - \$ 13,210				+ - \$ -9,160				+ - \$ 6,710			
Adjusted Sales Price of Comparables				Net 3.8 % Gross 4.8 % \$ 363,210				Net 2.5 % Gross 8.0 % \$ 355,840				Net 1.9 % Gross 16.3 % \$ 364,210			

The value conclusion, then, would be reconciled at \$360,000. It would first appear that the damages to the unit (3868 West County Road 350 North) would be the difference between the as-if not contaminated value (\$360,000) and the land value as-if contaminated (\$138,600). But that would assume the house is not habitable and that is clearly not the case because the owners still occupy the unit. Therefore, as-if contaminated value cannot reflect a total lack of improvement value.

A method for determining the value of the contaminated improvements can be developed by finding sales of older units, subtracting the estimated land value and adjusting the remaining improvement value by the various amenities considered important to the property. The remaining value is then divided by the square footage of the unit to find a dollar per square foot that is appropriate to distressed improvements and multiplying that number by the subject's square footage. This estimate is then added to the estimated value of the land as if contaminated to derive an estimate of value as if contaminated.

	Subject	Comparable Sale #1	Comparable Sale #2	Comparable Sale #3
Address	3581 West CR 350 North	712 Milligan Street	3588 West 226th Street	208 Kentucky Avenue
City	Danville, IN	Crawfordsville, IN	Sheridan, IN 46069	Tipton, IN 46072
Proximity to Subject	N/A	30 miles	37 miles	60 miles
Data Source	N/A	Data Files	Data Files	Data Files
Verification Source	Personal Inspection	MLS #21174547/DOM 23	MLS #21247635/DOM 464	MLS #21176441/DOM 5
Sales Price	N/A	\$ 25,000	\$ 38,000	\$ 43,191
Rights Transferred	Fee	Fee	Fee	Fee
Financing	Cash, Conventional	Cash	Cash	Cash
Condition of Sale	Arm's Length	Arm's Length	Arm's Length	Arm's Length
Date of Sale	Oct-16	Jun-12	Feb-14	Jun-12
Current Cash Equivalent	Revised \$	\$ 27,125	\$ 39,960	\$ 46,991
Less Lot and Site Improvements	Rural Hendricks County	Crawfordsville - Urban	Rural Hamilton County	Tipton - Urban
Value Attributed to Improvements		Mold 0.15 (15,000)	Mold 0.62 Acre (20,000)	Mold 0.20 (15,000)
Adjustments for Amenities	Agriculture 1960	Residential 999 9,600	Residential 1,360 6,000	Residential 1,396 6,000
Size	Partial Basement	Partial Basement	Full Basement	Crawl
Foundation	Covered Porch	Enclosed Porch	Deck	Enclosed Porch
Patios	No Fireplace	No Fireplace	No Fireplace	Fireplace (2,500)
Fireplace	No Garage	2 Car Dtchd Grg (1,500)	2 Car Attchd Grg (16,500)	2 Car Attchd Grg (1,500)
Garage		(6,900)		(13,000)
Net Adjustment				
Indicated Imprmnt Value/SF		\$ 18,100	\$23,460	\$ 30,191
Indicated Value per SF (Imprmnt Size/Indicated Value)		\$ 18.12	\$ 17.25	\$ 21.63
Indicated Value	\$ 20.64			

The three sales illustrated above show the average dollar per square foot for the damaged improvements was \$20.64. Rounded to \$21 and multiplied times the subject's square footage provides an estimate of the subject improvement equaling \$41,160 (1,960 x \$21). This, added to the lot value of the lot as contaminated provides a total value estimate of \$179,760 (\$138,600 + \$41,160), or rounded to \$180,000.

3868 West County Road 350 North, Danville, Indiana:

The located at 3868 West County Road 350 North is not an agricultural tract but is a 0.49-acre tract specifically developed for residential use. Assuming the tract was not contaminated, the site as-if vacant would be worth approximately \$27,500.

ITEM	SUBJECT PROPERTY	COMPARABLE NO. 1		COMPARABLE NO. 2		COMPARABLE NO. 3	
Address	3868 West CR 350 North (Land) Danville, IN 46122	5302 E County Road 550 N Pittsboro, IN 46167		7453 N State Road 39 Lizton, IN 46149		584 Casey Ct Danville, IN 46122	
Proximity to Subject							
Sales Price	\$ N/A	\$	29,900	\$	20,000	\$	28,000
Price \$/Sq. Ft.	\$	\$		\$		\$	
Data Source(s)	Inspection	BLS #21384066/DOM 34		BLS #21384066/DOM 34		BLS #21430767/DOM 3	
ITEM	DESCRIPTION	DESCRIPTION	+ (-) \$ Adjust.	DESCRIPTION	+ (-) \$ Adjust.	DESCRIPTION	+ (-) \$ Adjust.
Date of Sale/Time Adj.	10/01/2016	12/09/2015		12/09/2015		12/09/2015	
Location	Rural	Rural		Rural		Rural/Subdivision	-5,000
Site/View	Agriculture	Agriculture		Agriculture		Agriculture	
Size (SF)	21,344	40,075		40,075		33,106	
Shape	Rectangular	Rectangular		Rectangular		Irregular	
Woods	Partial	Superior	-2,500	No	+5,000	No	+5,000
Utilities	Private	Private		Private		Private	
Sales or Financing	N/A	Cash		Cash		Cash	
Concessions	N/A	No Assistance		No Assistance		No Assistance	
Net Adj. (Total)		<input type="checkbox"/> + <input checked="" type="checkbox"/> -	\$ -2,500	<input checked="" type="checkbox"/> + <input type="checkbox"/> -	\$ 5,000	<input type="checkbox"/> + <input type="checkbox"/> -	\$ 0
Indicated Value of Subject		\$	27,400	\$	25,000	\$	28,000

However, although the 26.66-acre site discussed above would still have the highest and best use as farm land under the current situation, the residential site at 3868 West County Road 350 North would have its highest and best use changed because of the introduction of the obnoxious odor. If vacant, its highest and best use would no longer be for residential unit but would evolve to a use that would no longer include occupancy. A possible alternative use, for instance, might be as an expansion to either of the adjoining lots. Tracts of less than one acre in size that sell at the low end of the vacant land market in Hendricks County sell within a range of \$7,000 to \$15,000. The value, therefore, as is (odor polluted) would be approximately \$10,000.

The ranch home would be attractive to a different set of market buyers than the property at 3581 West County Road 350 North. In this case, the typical buyer would be seeking a newer home within a rural setting but not within a formal subdivision. Such characteristics were used as a basis to determine the estimated market value of the ranch home as if not polluted. The following grid suggests the market value in that case would be approximately \$128,500.

Address	3868 W 350 N Danville, IN 46122	4546 S State Road 75 Coatesville, IN 46121	10387 Norman Rd Brownsburg, IN 46112	10679 N County Road 400 E Pittsboro, IN 46167
Proximity to Subject		11.5 miles	17.5 miles	14.4 miles
Sales Price	\$ 0	\$ 124,000	\$ 126,500	\$ 126,900
Price/Gross Living Area	\$ 83.67	\$ 96.12	\$ 97.32	
Data & Verification Sources	BLC/PublicRcd	BLC #21424904/DOM 11	BLC #21367657/DOM 105	BLS #21433438/DOM 2
VALUE ADJUSTMENTS	DESCRIPTION	+ (-)\$ Adjust.	DESCRIPTION	+ (-)\$ Adjust.
Sales or Financing	Arms Length/Conv		Arms Length/Cash	
Concessions	No Assistance		No Assistance	
Date of Sale/Time	7/08/2016		11/30/2015	8/31/2016
Location	Rural		Rural	
Site	0.49 acre	0.79 acre	0.30 acre	1.0 acre
View	Agriculture		Agriculture	
Design (Style)	Ranch/Brick		Ranch	
Actual Age (Yrs.)	45	51	38	50
Condition	Average		Average	
Above Grade	Total Bdrms Baths	Total Bdrms Baths	Total Bdrms Baths	Total Bdrms Baths
Room Count	7 3 1.5	7 3 2	3 3 2	7 3 2
Gross Living Area	1,478 Sq. Ft.	1,482 Sq. Ft.	1,316 Sq. Ft.	1,304 Sq. Ft.
Basement & Finished Rooms Below Grade	No Basement Crawl		No Basement Crawl	
Garage/Carport	2 Car Attchd Grq		2 Car Attchd G	
Fireplace	1 Fireplace	0 Fireplace	1 Fireplace	1 Fireplace
Fence/Outbuilding	Patio/Fence	No Patio/Fence	Deck/Fence	Patio
Net Adj. (total)		\$ 4,500	\$ 1,120	\$ 1,740
Adjusted Sales Price of Comparables		Net 3.6 % Gross 4.4 % \$ 128,500	Net 0.9 % Gross 1.7 % \$ 127,620	Net 1.4 % Gross 3.7 % \$ 128,640

One could then postulate that the damages to the residential unit (3868 West County Road 350 North) would be the difference between the as-if not contaminated value (\$128,500) and the land value as-if contaminated (\$10,000), or \$127,500. But the property is not completely uninhabitable therefore the improvements within the as-if contaminated value cannot reflect a total lack of value. They would, however, have been dramatically reduced.

Calculation of the damage to the improvements is generally the same as the prior calculation. In this case, the criteria for comparable sales was limited to those of distressed, ranch-style properties that sold within the general Indianapolis metropolitan area over the last several years. The following illustrate how that market accepts mold within the home.

	Subject	Comparable Sale #1	Comparable Sale #2	Comparable Sale #3	Comparable Sale #4
Address	3581 West CR 350 N Danville, IN	5585 Lincoln Road Martinsville, IN 46151	10706 Huntwick Drive Indianapolis, IN	5114 Southern Avenue Anderson, IN 46013	1939 Dunbar Heights Martinsville, IN 46151
City					
Proximity to Subject	N/A	37.5 miles	17 miles	70 miles	27.5 miles
Data Source	N/A	Data Files	Data Files	Data Files	Data Files
Verification Source	Personal Inspection	MLS #21435606/DOM 7	MLS #21344023/DOM 37	MLS #21371247/DOM 52	MLS #21357715/DOM 183
Sales Price	N/A	\$ 96,000	\$ 123,000	\$ 38,000	\$ 32,000
Rights Transferred	Fee	Fee	Fee	Fee	Fee
Financing	Cash, Conventional	Cash	FHA	Cash	Cash
Condition of Sale	Arm's Length	Arm's Length	Arm's Length	Arm's Length	Arm's Length
Date of Sale	Jul-16	Aug-16	May-15	Oct-15	Jan-16
Current Cash Equivalent	Revised \$	\$ -	\$ 126,100	\$ 38,570	\$ 32,350
Less Lot and Site Improvements	Rural Hendricks County	Rural Morgan County	Indianapolis - Suburban	Suburban Anderson	Rural Putnam County
Value Attributed to Improvements		Pet Smell - Rip out walls .72 acre (27,500)	Pet Smell 0.13 acre (27,500)	Pet Smell & Mildew 0.24 acre (20,000)	Mold & Termites 0.27 acre (20,000)
Adjustments for Amenities	Agriculture	Agriculture	Residential	Residential	Agriculture
Size	1478	1,785	1724	1,221	1,368
Foundation	Crawl	Full Basement	Crawl	Crawl	Crawl
Patio/Fence	Patio	Patio	Patio/Enclosed Porch	No Patio	Deck
Fireplace	Fireplace	Fireplace	No Fireplace	No Fireplace	No Fireplace
Garage	2 Car Attchd Grq	2 Car Attchd Grq	2 Car Attchd Grq	2 Car Attchd Grq	No Garage
Net Adjustment		(35,570)	(27,600)	(17,000)	(13,900)
Indicated Imprmnt Value/SF		\$ 60,430	\$ 98,500	\$ 21,570	\$ 18,100
Indicated Value per SF (Imprmnt Size/Indicated Value)		\$ 33.85	\$ 57.13	\$ 17.67	\$ 13.23
Indicated Value	\$ 28.06				

Comparable Sale #5		Comparable Sale #6		Comparable Sale #7		Comparable Sale #8	
2149 N CR 100 North		404 E 38th Street		7363 N CR 575		504 Gray Fox Run	
Winchester, IN		Anderson, IN 46013		Frankton, IN 46044		Arcadia, IN 46030	
110 miles		70 miles		70 miles		52 miles	
Data Files		Data Files		Data Files		Data Files	
MLS #21295123/DOM 11		MLS #21430433/DOM 59		MLS #21365233/DOM 336		MLS #21243986/DOM 137	
	\$ 40,000		\$ 62,207		\$ 44,500		\$ 62,207
Fee		Fee		Fee		Fee	
Cash		Cash		Conventional		Cash	
Arm's Length		Arm's Length		Arm's Length		Arm's Length	
Jul-04	1,700	Nov-13	-	Jun-16	3,300	Jan-16	350
	\$ 41,700		\$ 62,207		\$ 44,514		\$ 62,557
Rural Randolph County		Suburban Anderson		Rural Hamilton County		Rural Putnam County	
Mold		Mold in walls		Mold in walls		Mold & Termites	
0.6 acre	(20,000)	0.12 acre	(20,000)	0.20 acre	(20,000)	0.27 acre	(20,000)
Residential		Residential		Agricultural		Agriculture	
1200	2,800	1,428		1,112	36,600	1,368	1,100
Crawl		Full Basement	(5,000)	Crawl		Crawl	
Patio		Patio	500	No Patio	500	Deck	
No Fireplace	2,500	Fireplace		No Fireplace	2,500	No Fireplace	2,500
2 Car Attchd Grg	(14,700)	1 Cr Attchd/2 Car Dtchd	(2,500)	No Garage	2,500	No Garage	2,500
			(27,000)		22,100		(13,900)
	\$ 27,000		\$35,207		\$22,414		\$ 48,307
	\$ 22.50		\$ 24.65		\$ 20.16		\$ 35.31

The loss in improvement value is illustrated by the loss of value of other distressed properties once adjusted for their land value. The comparable sales in this grid were selected from sales that have closed within the last three years within the greater Indianapolis area that were said to be damaged by either pet odor or mold presence. In several cases, the odor was sufficiently obnoxious that interior walls had to be removed in the remediation process.

The eight sales illustrate the average dollar per square foot for the damaged improvements was \$28.06. Rounded to \$28 and multiplied times the subject's square footage provides an estimate of the subject improvement equaling \$41,384 (1,478 x \$28). This, added to the lot value of the lot as contaminated provides a total value estimate of \$51,384, or rounded to \$51,500.

Damages to the property at 3868 West County Road 350 North is calculated as:

Estimate Value As-If Not Contaminated	Estimated Value As-Is	Damages	Percentage
\$128,500	\$51,500	\$77,000	60.0%

Damages to the property at 3581 West County Road 350 North is calculated as:

Estimate Value As-If Not Contaminated	Estimated Value As-Is	Damages	Percentage
\$360,000	\$181,200	\$178,800	49.5%

Income Approach

The Income Capitalization Approach is where the mathematical process of dividing a property's anticipated net operating income derives a value indication by a derived rate of income capitalization. The income approach is not presented in this report due to the lack of rental information on properties that are contaminated like the subjects. Therefore, calculation of the diminishment of value is not appropriate by this method.

Test of Reasonableness

As illustrated in the text above and within the articles from national publications attached in the Addendum, property values of residential units within proximity to CAFOs suffer from a diminution of value. Generally, it has been determined that residential units within one half mile are affected on a higher degree than others – especially those considered downwind from the offending CAFO. Both subject properties suffer from these specific conditions. A damage estimate of 50% and 60% appear to be well within reason.

Reconciliation and Final Value Estimate

Determining stigma damage can be difficult. Although sometime considered as speculative, there is no doubt, either from peer-reviewed literature or actual experience, that obnoxious odors associated with a typical CAFO operation cause a form of market resistance to local residential units. It has been determined that the degree of proximity and the direction of the prevailing winds are of importance when calculating the market resistance in this market.

Note that both subject properties were in existence for several decades prior to the construction of the CAFO. Had the CAFO been in operation prior to either house being constructed, an argument could be made that the homeowners had taken on the risk of the loss of value due to the CAFO. The opposite is not true.

Both properties in question suffer from:

- air borne pollutants carrying varying degrees of health risks;
- prevailing winds carrying contaminants directly to the property;
- insect vectors that house flies, stable flies, and mosquitoes to the properties;
- possible groundwater leaching because of nearby manure spreading; and
- loss of property value.

In addition, both properties have an extended possibility of receiving potential diseases causing pathogens like parasites, bacterium, and/or viruses. The source property, along with both subject properties, are serviced with well and septic so groundwater contamination is a real threat.

Although both the Cost and Income Approaches were addressed within this analysis, market reactions were best observed through the Sales Comparison Approach. Detailed searches of property sales that reflect the property values As-If-Not-Contaminated were compared with a rational discussion of property values As-Is – or As-If Contaminated. The difference reflects the loss of value due to the presence of the CAFO.

Based upon our inspection of the subject property, in conjunction with our various investigations and valuation analyses undertaken to date, I have formed the opinion that - as of the effective date being October 15, 2016 - the subject property had an estimated value loss of:

Damages to the property at 3868 West County Road 350 North is calculated as:

Estimate Value As-If Not Contaminated	Estimated Value As-Is	Damages	Percentage
\$128,500	\$51,500	\$77,000	60.0%

Damages to the property at 3581 West County Road 350 North is calculated as:

Estimate Value As-If Not Contaminated	Estimated Value As-Is	Damages	Percentage
\$360,000	\$181,200	\$178,800	49.5%



Nick A. Tillema, MAI, SRA, CCIM, AI-GRS, AI-RRS
 Indiana Certified General Appraiser
 License Number: CG69100358

December 7, 2016

Date

SUMMARY OF SALIENT FACTS AND CONCLUSIONS

PROPERTY NAME:	CAFO (HIMSEL/LANNON)
PROPERTY USE TYPE:	Residential
REAL PROPERTY:	The subject property consists of two residential units located in a rural area of northwest Hendricks county. One of the homes is a $\pm 1,960$ -square foot older home set on an irregularly shaped parcel constituting ± 26.66 acres. It is additionally improved with several outbuilding, fences and other farm related buildings. The second unit is a $\pm 1,478$ -square foot ranch home set on a $\pm .49$ acres tract situated on a county road. Based on observed physical appearance during the inspection, the subject appears to be in average condition.
GENERAL LOCATION:	It is generally located within the northwestern part of Hendricks County – approximately 6 miles southeast of North Salem, Indiana; 6.5 miles northwest of Danville and approximately 35 miles due west of Indianapolis.
ASSET LOCATION:	
Mailing Address:	3581 West 350 North and 3868 West 350 North
Township & County:	Marion Township, Hendricks County
City, State & Zip Code:	Danville, Indiana 46122
PARCEL NUMBER:	32-05-24-300-001.000-017 and 32-05-24-100-005.000-017
Owner of Record:	3581 West 350 North, Danville, Indiana (Himsel, Richard & Janet) 3868 West 350 North (Lannon, Robert & Susan)
DEFINITION OF THE PROBLEM:	As of the effective date of this appraisal, are the contamination problems associated with the CAFO substantial enough to lessen their property values of the two residential units and, if so, to what degree.
PURPOSE OF THIS ANALYSIS:	The purpose of this analysis is to present written evidence to be used as litigation support. This narrative report presents the data and reasoning the appraiser has used to form such an opinion.
SCOPE OF THIS ANALYSIS:	<p>The scope is an organized collection and examination of all data from a physical, economic and legal standpoint as they might affect market value. Each is then analyzed in an orderly fashion to derive an estimate of market value.</p> <p>The data included in the report represents information collected from several sources, not limited to, grantors and grantees of properties, real estate brokers, real estate appraisers, multiple listing associations and real estate management companies. Unless otherwise noted, the time span designated as the period for comparable analysis was two years prior to the valuation date. Sources are quoted were applicable.</p> <p>Confirmation of all data is made to the extent that confirmation is practical. The majority of the market data used in this analysis has been developed through the Metropolitan Indianapolis Board of Realtor – Broker Listing Cooperative (BLS) – an organization recently organized by the joining of a number of metropolitan multiple listing services within the central Indiana.</p>

Provisions for membership in the computer system require all Realtors to insert required data concerning a listing within 48 hours after the listing agreement is signed.

Failure to include all and/or accurate information can be the basis for suspension from the system, therefore, verification beyond the information provided by such listings has not been undertaken for this analysis. Therefore, confirmation past the written information has not been performed for this assignment.

Data collected is analyzed to determine the subjects' highest and best use, then developed through the three approaches to value (when applicable), and lastly, reconciled into a final value estimate. Exclusion of any approach (if necessary) is explained and justified elsewhere in this report. In this case, based on the age of the improvements, the Cost Approach does not appear to have credibility. And, based on the lack of comparable rental information concerning properties like the subject, the Income Approach has also been eliminated from the process.

All of the data collected is not presented in this report. Data collected during the examination of the subject market, but not considered relevant, is included in the appraiser's file. This appraisal report includes all information considered necessary to illustrate the appraiser's basis for forming an estimate of the change in the subject property's market value.

PERTINENT DATES:

The property was last inspected and photographed on July 7, 2016, by the appraiser, Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM. The effective date of the appraisal is October 15, 2016. The report was prepared in the intermediate time frame and signed on December 7, 2016.

INTEREST APPRAISED:

The real property interest appraised in the before/after analysis is the fee simple estate interest. It is defined as:

"Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat."⁹

Fee simple estate is recognized as the highest state of ownership, an absolute fee, a fee unencumbered by restrictions; a fee without limitations of use or dispositions to any particular class of heirs; subject only to the aforementioned limitations.

⁹ Appraisal Institute, The Dictionary of Real Estate Appraisal, Fifth Edition, (Chicago, Appraisal Institute, 2002), p. 113.

COMPETENCY:

Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM, is currently a Certified General Appraiser [License number C.G. 691 00358] by the State of Indiana; is designated as a commercial (MAI) and residential (SRA) appraiser; General Review Appraiser (AI-GRS); and Residential Review Appraiser (AI-RRS) by the Appraisal Institute; and is designated as a commercial real estate specialist by the CCIM Institute. Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM has performed and adequately completed appraisals concerning the analysis and valuation of such improvements similar to the subject since 1978. Adequate study was made of the local area to make the appropriate area, regional and neighborhood analysis.

DEFINITION OF MARKET VALUE:

Fair market value is specifically identified to differentiate the conclusion of this analysis from other forms of value. The Internal Revenue Service specifically asks for the fair market value in preparing an analysis for a conservation easement. Fair market value is defined in this report, per IRS Publication 561, as:

"...Fair market value (FMV) is the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts."¹¹⁰¹¹

INTENDED USER:

This report is for the use of Ms. Kim Ferraro, Senior Attorney at the Hoosier Environmental Council, their employees, agents, successors and assigns may rely upon this report in evaluating the property for settlement analysis. It is mutually agreed that the client shall hold harmless the appraiser against any legal or governmental inquiry that may evolve involving the subject property.

INTENDED USE:

This presentation centers on an estimate of the market value loss based on accepted appraisal principles and techniques. No attempt is made to determine "sentimental," "book," "historic," or "investment" value. This report is for the sole and private use of the client.

Acceptance and use of this report shall constitute contractual agreement with an implied consent to all of the definitions, functions, purposes, and limiting conditions contained in this report. No consideration is given to conditions reflecting a forced sale, foreclosure, or coerced liquidation of property.

¹⁰ Ibid, p. 60.

¹¹ IRS Publication 561 (2007) page 2.



Appraisers' Certification of Value

We hereby certify that, to the best of our knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The reported analyses, opinions and conclusions are limited only by the reported assumptions and limiting conditions and are our personal, impartial, and unbiased professional analysis, opinions and conclusions.
- I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved.
- I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- My engagement in this assignment was not contingent upon developing or reporting predetermined results.
- My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- My analyses, opinions, and conclusions have been developed, and this appraisal report has been prepared in conformity with the requirements of the Uniform Standards of Professional Appraisal Practice; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute.
- Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM, conducted a full inspection of the property that is the subject of this report on July 7, 2016.
- Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM, is professionally competent to perform this appraisal assignment by virtue of previous experience with similar assignments and/or research and education regarding the specific property type being appraised.
- No one provided significant real property appraisal assistance to the persons signing this certification.
- I have performed no other services, as appraisers or in any other capacity, regarding the property that is the subject of this report within the three-year period immediately preceding the acceptance of this assignment.
- The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
- As of the date of this report, Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM has completed the continuing education program of the Appraisal Institute.

As of the effective date of this report, being: December 7, 2016

Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM
Certified General Appraiser
Indiana License CG69100358



Report Limitations

Scope of Work

Underlying Premises and Assumptions

Unless otherwise stated, this appraisal of real estate is made expressly subject to the following:

1. Title:

That no opinion is intended to be expressed for matters legal in character, or that would require specialized investigation or knowledge beyond that ordinarily employed by real estate appraisers, although such matters may be discussed in the report. No opinion as to title is rendered within this report. Title is assumed to be marketable and free and clear of all liens, encumbrances and restrictions except those specifically discussed in the report. The subject property is assumed to be vested in the indicated owner of record.

2. Responsible Ownership / Management:

That value estimate concerning the subject property is appraised assuming it to be under responsible ownership and competent management.

3. Information Sources:

That while the information in this report has been carefully checked and is believed to be reliable, no warranty is given for the accuracy of information obtained from the owner, from representatives of the owner, from other informed persons, or from other sources of available information. Data on ownership and the legal descriptions have been obtained from sources generally considered reliable.

4. Hidden or Unapparent Conditions:

This appraisal analysis and subsequent report values the property on an "as-is" basis, and assumes there are no hidden or unapparent conditions of the property, soil and sub-soil that would render potential development of the site more or less viable than otherwise comparable properties. While not considered conclusive, information ascertained - and either presented within this report or maintained within our office file - is considered consistent with information that would be available to the general public, (i.e., potential purchasers, real estate brokers and/or other real estate appraisers).

5. Subsurface Rights:

That no opinion is expressed as to the potential value of subsurface oil, gas or mineral rights. It is assumed that the subject property is not subject to surface entry for the exploration or removal of such materials except as may be expressly stated herein.

6. Improvement's Compliance with various Legal Jurisdictions:

That, unless stated, described, and considered within this report, the appraisal is based upon the premise that the subject property's site and improvement development (and proposed improvements), have been developed in full conformance with all applicable federal, state, and local building development and environmental regulations and laws. This includes (but is not limited to), all applicable zoning, building use and development regulations, and development /restrictions of all types. No responsibility is assumed for hidden defects or lack of conformity with specific government requirements, such as fire, building and safety, flood hazard development, earthquake, occupancy codes, or general conformance with the Americans with Disabilities Act. It is assumed that proof of conformance, (in the form of required licenses, certificates of occupancy, consents, and/or permits), with various requirements of federal, state, and local legislative or administrative authorities, (as well as those of concerned private entities, or organizations), can readily be obtained. Any improvements developed upon the subject property that is found to be developed without such permits shall invalidate all value estimate(s) presented within this appraisal report.

7. Exhibits - Graphics:

That all maps, plats, sketches, photographs and other graphic exhibits included herein are for illustrative purposes only and included as an aid in visualizing matters discussed within the report. The absolute accuracy is not assumed of any graphic representations included, referred to, or which have been made by others. They are not to be considered or relied upon for any other purpose.

8. Encroachment:

That the use of the land is confined within the boundaries or the property lines of the property described and that there is no encroachment or trespass upon the subject property unless noted otherwise within this report.

9. Financing:

That it is recognized a potential purchaser will likely take advantage of the maximum available financing. The effects of such financing on the probable selling price have been considered within the valuation analysis.

10. Highest and Best Use:

That the subject property is appraised assuming it is to be available for its highest and best use.

Stipulations and Limiting Conditions

In addition to the preceding underlying premises and assumptions, this appraisal report is presented for use based upon the following stipulations and limiting conditions:

- That the term "market value," as herein used, is defined as delineated within the Definition of Market Value sub-section of this appraisal report.
- That the date of value to which the opinions expressed in this report apply is set forth in the letter of transmittal, as well as delineated under the section titled "Effective Date of the Appraisal." Our office assumes no responsibility for economic or physical factors occurring at some later date that may affect the opinions stated herein.
- That the market value estimated and the costs used are as of the effective date of the estimate of value. Unless stated otherwise, all dollar amounts are based on the purchasing power and price of the dollar as of the indicated effective date of the value estimate.
- That the value estimate in the appraisal report is not based in whole or in part upon race, color, religion, or national origin of the present owners, or occupants of the properties in the vicinity of the property appraised.
- That the estimated market value is subject to change with market changes over time; value is highly related to exposure, time, promotional effort, terms, motivation, and conditions surrounding the offering. The value estimate considers the productivity and relative attractiveness of the property both physically and economically in the marketplace. This report does not consider the potential discounting required to reflect a motivated or "forced sale" due to bankruptcy or foreclosure.
- That disclosure of the contents of this report is governed by the by-laws and regulations of the Appraisal Institute and Uniform Standards of Professional Appraisal Practice, (USPAP).
- That this appraisal consists of "trade secrets and commercial, or financial information," all of which is privileged and confidential, and exempted from disclosure, under 5 U.S.C. 552 (b) (4).
- That no environmental or impact studies, special market study or analysis, highest and best use analysis study, or feasibility study has been requested or made unless otherwise specified in an agreement for services, or in this report.
- That, unless otherwise noted within this report, any value estimate set forth within this report applies only to the subject property analyzed within this report. Additionally, unless a specifically identified proration or division is set forth within this appraisal report, any proration or division of the total into fractional interests will invalidate the value estimate.

- That, by reason of this appraisal report, our office's representatives are prepared to give testimony in court with reference to the property in question, and the interest therein, provided satisfactory negotiations have been made for payment of services, for attendance in court, while under subpoena, or in any other pretrial work requested by the attorney for either party.
- That possession of this report, or any copy thereof, does not carry with it the right of publication, nor may it be used for any other reason other than its specifically intended use. The physical report remains the property of our office. This report is for the sole intended use of the client exclusively. The fee is compensation for analytical service only.
- That this appraisal report may not be used, except in its entirety, by anyone but the principals identified in the cover letter / letter of transmittal. Such other use is specifically unauthorized. Possession of this report, or any authorized copy thereof, does not carry with it the right of publication, nor may it be used for any purpose other than its intended use. Duplication of this report is unauthorized unless the principle appraiser signing this report has been notified and consented in writing to the request for duplication.
- That the projections included in this report are utilized to assist in the valuation process and are based on current market conditions, anticipated short term supply and demand factors, and a continued stable economy. Therefore, the projections are subject to changes in future conditions that cannot be accurately predicted by representatives of our office and could affect the future income or value projections.
- That our office representatives reserve the unlimited right to alter, amend, revise or rescind any of the statements, findings, opinions, values, estimates or conclusions upon any subsequent study, analysis or previous study subsequently becoming known to this office.
- That much of the information and analysis presented within this report, as well as the physical appraisal report itself, was generated by way of electronic means. While our office representatives assume the responsibility for mathematical calculations, spelling, and grammar, we depend heavily upon the accuracy of all software and hardware employed. Our office representatives do not assume responsibility for any software deficiencies that are beyond the scope of knowledge of a typical software user.
- That - while Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps (FIRM) were used to determine if the property is located in or near a high probability flood area - our office representatives are not qualified to give an opinion as to the subject property's mean elevation above sea level. Because FIRM maps are revised without notice to the public, it is suggested that a second source of flood hazard data, (i.e. a recent survey), be used to verify flood data provided herein.

Extraordinary Assumptions and Hypothetical Conditions

None used.



**Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM
Attorney at Law**

Nick has been involved in the real estate/finance industry since 1972. His education includes a Bachelor's of Finance from Indiana University, a Masters of Business Administration from Arizona State University and a Doctorate of Jurisprudence from Indiana University - Indianapolis. His background includes leasing and management with a Chicago-based, regional, shopping center owner; mortgage banking (origination, underwriting, secondary marketing & management), title company (co-owner); property management, real estate development (residential condominiums); investment, consulting and appraising (residential, commercial, easements and diminutive damages).

His experience in teaching includes real estate broker and appraiser pre-licensing classes, continuing education seminars and real estate college classes for private schools, professional organizations, Indiana University and Butler University. He has written numerous seminars for both law and real estate professionals. He is currently the chair of both the board of directors of the Appraisal Institute Relief Foundation and the Appraiser Liability Insurance Program. He has also served on the national board of directors for the Appraisal Institute and has served on the board of directors of the Hoosier State Chapter of the Appraisal Institute, the Indiana CCIM chapter, the Indiana Association of Realtors, the Realtor Foundation, and the Metropolitan Indianapolis Board of Realtors.

As an attorney, he has both prosecuted and defended real estate appraisers. As an appraiser, he has reviewed both residential and commercial appraisals as part of a litigation team. His background and education allow him to speak intelligently on today's appraisal issues.

As an appraiser, his experience includes appraising farms, local and regional shopping centers, conventional and HUD apartment facilities, steel mills, oil refineries, and mega-warehouses. His experience with special purpose properties includes mega-church facilities, school buildings, cemeteries, airports, the Detroit RiverWalk and an abandoned U.S. Air Force Base. Specialty appraisal assignments have included forensic appraising for litigation purposes, conservation easements, pipeline easements and properties affected by environmental contamination, construction defects and partial interests.

Nick A. Tillema, MAI, SRA, AI-GRS, AI-RRS, CCIM
9247 North Meridian, Suite 260
Indianapolis, IN 46260

Indiana Certified General Appraiser
Indiana Principal Real Estate Broker
nick@accessvaluation.com – e-mail

#CG69100358
#IB51247724

317.571.8800 – Office
317.581.9553 – Facsimile
317.581.0400 – Cellular

PROFESSIONAL EXPERIENCE:

ACCURITY VALUATION (1/16 to present)
Valuation, Consulting & Litigation (Indiana Representative)
ACCESS GROUP, LLC - (1/04 to present)
Valuation, Education, Consulting & Litigation Support
NICK A. TILLEMA AND ASSOCIATES - (1/82 to present)
Appraisal/Research
THE FORRESTAL GROUP – (11/95 to present)
Environmental Consulting/Appraisals
SYCAMORE TREE DEVELOPMENT, INC. – (1/92 to present)
Real Estate Development
FRONTIER TITLE COMPANY – (1-91 TO 7-93)
President
MEDLEY, SMITH, KOLAS & TILLEMA - (6/90 to 1/94)
Attorneys at Law
MERIDIAN MORTGAGE COMPANY, INC. – (4/75 to 6/82)
Senior Vice President – Administration
LANDAU, HEYMAN & CLAY - (7/72 TO 3/75)
Commercial Leasing (Indiana)

FORMAL EDUCATION:

INDIANA UNIVERSITY SCHOOL OF LAW
Doctor of Jurisprudence (JD) - (9-81 to 1-87)
ARIZONA STATE UNIVERSITY
Masters of Business Administration – MBA - (9-71 to 7-72)
INDIANA UNIVERSITY
Bachelors of Science (BS – Finance) - (9-68 to 8-71)

PROFESSIONAL EDUCATION AND SEMINARS (partial listing):

SOCIETY OF REAL ESTATE APPRAISERS
Principles of Real Estate Appraising
Narrative Report Writing Seminar
Condominium Appraising Seminar
R-41B & Professional Practice Seminar
Instructor Course (101)
Appraising with the URAR Form
Marshall & Swift Cost Seminar
Legal Liability
AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS
Basic Valuation Procedures 1A-1 & 1A-2
Capitalization Theory 1B-a & 1B-2
Case Studies & Report Writing
Standards of Professional Practice
APPRAISAL INSTITUTE
Standards of Professional Practice

RECOGNITION

- 1991 – **Dick Snyder Award** (Indiana Association of Realtors)
- 2005 – **Ed White Award** (Hoosiers State Chapter, Appraisal Institute)
- 2006 – **Extra Mile Award** (Hoosiers State Chapter, Appraisal Institute)
- 2009 – **Fellow of REAL** (Metropolitan Indianapolis Board of Realtors)
- 2011 – **Richard E. Nichols Lifetime Achievement Award** (Hoosiers State Chapter, Appraisal Institute)

PROFESSIONAL ORGANIZATIONS:

APPRAISAL INSTITUTE (combined with the Society of Real Estate Appraiser in 1991)
 Designated Member of the Appraisal Institute (MAI - June, 1992 & SRA – March, 1985))
 Hoosier State Chapter
 Indianapolis Sub-Chapter Appraisal Institute – Past Chairman (1999)
 Hoosier State Chapter Appraisal Institute – President (2004)
 Region V
 Regional Representative – Region 5 - (1994 to 1998)
 Regional Chairperson (2007-2010)
 National Ethics Committee – Past Assistant Regional Member
 National
 Appraisal Institute – National Nomination Committee (2005 – Alternate)
 Appraisal Standards and Guidance Committee (2005-2006)
 Board of Directors (2007-2010)
 Publications Review Panel (2010 – 2012)
 Appraisal Institute Relief Fund - Board of Directors (2009 – 2012)(Chair 2011) & (2014 – 2016)(Chair – 2016)
 Strategic Planning Committee (2012-2013)
 Government Relations Committee (2005-2007 & 2011-2013) (Chair 2012/2013)
 Appraiser's Liability Insurance Program – Board of Directors (2014 – 2016) (Chair – 2016)
 SOCIETY OF REAL ESTATE APPRAISERS (CHAPTER 5)
 (Past President ['89], Secretary ['84], Director ['85-'87])
 (Chairman of Standards of Professional Practice, 1987-1990)
 Designated as Senior Residential Appraiser (SRA) 1985
 CCIM INSTITUTE
 Designated Member of the CCIM (October 2004)
 Indiana Chapter of CCIM – Board of Directors (2010-2012)
 NATIONAL, STATE, AND LOCAL BOARD OF REALTORS
 Designated as Realtor (1978)
 Past Chairperson – Appraisal Committee of Indiana Association of Realtors
 Past Chairperson - Broker/Appraiser Committee MIBOR
 Board of Directors - MIBOR (1998 – 2000)
 Board of Directors - Indiana Association of Realtors (2000 – 2006 and 2010 - 2012)
 Board of Directors – Realtors Foundation (2007 – 2012)
 INDIANAPOLIS BAR ASSOCIATION
 Real Estate/Probate Committee (2005 to Present)
 INDIANA BAR ASSOCIATION
 Indiana Bar Ethics Committee (2006-2009) & (2010-2013)
 INDIANAPOLIS BUILDER'S ASSOCIATION (Inactive)
 Past Member (1980 – 1984)
 NATIONAL ASSOCIATION OF ENVIRONMENTAL RISK AUDITORS (Inactive)
 Past Legal Counsel & Member of Board of Directors – National Organization
 INDIANA INSTITUTE OF REAL ESTATE EDUCATORS (Inactive)
 Designated as Certified Real Estate Instructor – CREI (Charter Member)
 INDIANAPOLIS MORTGAGE BANKERS ASSOCIATION (Inactive)
 (Past President - 1979)

OTHER ACTIVITIES:

ACCESS EDUCATION, INC.
 Principal (Pre-licensing & Continuing Education for Real Estate Appraisers and Brokers)
 APPRAISAL INSTITUTE
 Instructor – See attached
 INDIANA UNIVERSITY PURDUE UNIVERSITY AT INDIANAPOLIS (I.U.P.U.I.)
 Part-time Instructor – course R-305, R-440 & R-443 (1993 to present)
 REAL ESTATE RECERTIFICATION PROGRAM
 Instructor – Real Estate Appraiser and Broker Licensing Courses (1979 to 2010)
 RESOURCE EDUCATION
 Instructor – Pre-licensing and Continuing Education Seminars (1998 to 2010)
 BUTLER UNIVERSITY
 Instructor – Principles of Real Estate Law (1976 to 1978)
 SOCIETY OF REAL ESTATE APPRAISERS (1985 to 1989)
 Instructor – Principles of Real Estate Appraising (101)
 Instructor – Seminar "Appraising for Underwriters"
 NATIONAL ASSOCIATION OF ENVIRONMENTAL RISK AUDITORS
 Instructor – Environmental Effects of Real Estate (1989 to 2002)
 CERTIFIED AUCTIONEER INSTITUTE
 Instructor – Real Estate Appraisal & Auctioneering (1989 to 1993)
 INDIANA REAL ESTATE EDUCATION ADVISORY COMMISSION
 Vice Chairman (1998 – 2007)

LITIGATION EXPERIENCE as an Expert Witness (2007 – 2012)

* (an expanded list available upon request)

- I. Washington D.C. - **Decatur Ventures v. Stapleton Ventures** (NovaStar Home Mortgage, Inc. and Courtenay Stocker) – July 25, 2007. Suit against mortgage originator for applying pressure on appraisers. Settled out of court (Weiner Brodsky Sidman Kider, PC)
- II. Lebanon, Indiana – **Boone County Assessor v. Duke** – February 2007. Property tax dispute on three mega-warehouse facilities in Boone County. Trial testimony (Boone County Assessor)
- III. Indianapolis, Indiana **Winterton Investor, LLC v. Winterton, LLC** – October 2007. A valuation of an office complex in regards to a breach of contract dispute. Depositions and trial testimony (Mitchell Hurst Jacobs & Dick, LLP)
- IV. Noblesville, Hamilton County, Indiana – **Keeler Conservation Easement** – January 2008. IRS challenge to conservation easement – successfully rebuffed at IRS Hearing (Bakers & Daniels, LLP)
- V. Gary, Lake County, Indiana – **US Steel** – October 2008. Property tax appeal. Depositions and trial (Parker Poe Adams & Bernstein, LLP)
- VI. Gary, Lake County, Indiana – **Mittal Steel USA – Indiana Harbors West, formerly Bethlehem Steel** – June 2009. Property tax appeal. Deposition (Parker Poe Adams & Bernstein, LLP)
- VII. Indianapolis, Marion County, Indiana – **One Indiana Square** – September 2009. Determination of damages for suit against insurance company involving storm damage to the top five floors of a 36-story office building in downtown Indianapolis. Conference – no depositions (Barnes & Thornburg, LLP)
- VIII. Niles, Michigan – **Brandt v. Brandt** – September 2009. Divorce settlement concerning the River Valley Equine Clinic located in Niles, Michigan with the trial taking place in North Carolina. Trial testimony (Marcia H. Armstrong, Attorney at Law)
- IX. Gary, Lake County, Indiana – **Mittal Steel USA – Indiana Harbors East, formerly Inland Steel** – December 2009. Property tax appeal. Depositions (Parker Poe Adams & Bernstein, LLP)
- X. Martinsville, Morgan County, Indiana – **Wildwood Conservancy District** – February 2010. Exceptional benefits study designed to assign lot owners their prorated share of the cost involved in repairing a common area lake damaged by 2008 100-year flood. Trial testimony (Wooden & McLaughlin)
- XI. Nineveh, Johnson County, Indiana – **North Lake Conservancy District** – May 2010. Exceptional benefits study designed to assign lot owners their prorated share of the cost involved in repairing a common area lake damaged by 2008 100-year flood. Trial testimony (Wooden & McLaughlin)
- XII. Gary Airport, Gary, Indiana – **Gary/Chicago International Airport Authority v. Gary Community School Corporation** – May 2010. Report of three-member court appointed panel concerning values of wetland trade. (Lake County Superior Court)
- XIII. Ross Township, Lake County, Indiana – **Boltar v. Comm., Docket No. 25954-08** – June 2010. IRS challenge to a Conservation Easement valuation in Hobart Indiana. Testimony in Denver, Colorado. Trial testimony [IRS Office of Chief Counsel (SB/SE)]
- XIV. Poland, Owen County, Indiana – **Graybrook Conservancy District** – July 2010. Exceptional benefits study designed to assign lot owners their prorated share of the cost involved in replacing a common area lake damaged by 2008 100-year flood. Trial testimony (Wooden & McLaughlin)
- XV. Carmel (Hamilton County) Indiana – **Village of West Clay v. Pulte Homes** – February 2011. Value loss caused by introduction of production homes in a custom home addition. Temporary Injunction – Trial Testimony (Brooks Koch & Sorg)
- XVI. Greenwood, Indiana – **Ingram v Young**, September 2011. New Construction damage dispute on proximity of home to street. Trial Testimony (Wooden & McLaughlin)
- XVII. Yorktown, Indiana – **State of Indiana v. Roberts**, September 2011. Highway taking involving proximity damage. Trial Testimony (Dennis, Wenger & Abrell P.C.)
- XVIII. Indianapolis, Indiana, **Marion County Assessor v. Herrick, et al** – October 2012. Property tax issue involving an analysis of the difference in market rent and rent charged to a not-for-profit corporation and how such difference affects the true tax value opinion to be used in conjunction with an ad valorem tax matter. Trial Testimony (Krieg DeVault, LLP)
- XIX. Indianapolis, Indiana – **AurGroup v. California Credit Union** - December 2011. Valuation concern over large apartment complex. Trial testimony – in Los Angeles, CA (Todd Kobernick, Attorney at Law.)
- XX. Yorktown, Indiana – **State of Indiana v. Reynolds**, May 2012. Highway taking involving proximity damage. Trial Testimony (Dennis, Wenger & Abrell P.C.)
- XXI. Yorktown, Indiana – **State of Indiana v. Hughes**, July 2011. Highway taking involving proximity damage. Trial Testimony (Dennis, Wenger & Abrell P.C.)
- XXII. Shelbyville, Indiana – **Shelby County Assessor v. 500 Rangeline**, August 2012. Valuation definition problem. Trial Testimony (Marilyn Meighn)
- XXIII. Bloomington, Indiana – **State of Indiana v. Freeman**, November 2012. Eminent domain value of highway taking involving limestone quarry. (Three-member, court-appointed, valuation panel)
- XXIV. Indianapolis, Indiana – **CVS v. Monroe County**, August 2014, Valuation review. Trial Testimony (Meighn)
- XXV. Shelbyville, Indiana – **CVS – Shelby County**, January 2016, Valuation. Trial Testimony (Cusiamno)

INTERESTING ASSIGNMENTS (Overview)

Contamination

- **Richmond Shell Gasoline Spill** – 1996. (Contamination of nearby residence, delicatessen, and nursery school)
- **Evansville Subdivision** – June 1997 (Termiticide contamination of subdivision retention pond and the resulting loss of lake front properties)
- **White River Fish Kill** – May, 2000 (Class Action suit involving the value loss of residential units on riverfront properties based on industrial chemical spill causing a total fish kill along a 52 mile stretch of the White River.) Completed through Forrestal (Gene Stuard)
- **Bedford GM Plant** – July, 2003 – Allgood et al. v. General Motors Corporation, U.S. District Court, (PCB contamination of rural areas including 50+ residential units)
- **Goshen 7-Eleven Gasoline Spill** – October, 2003 - Bowens, et al. v. 7-Eleven, Inc. et al. – Cause No. 20D03-0209-CT-048 (Gasoline spill that damaged nearby homes)
- **Farmland Shell Gasoline Spill** – November 2003 – Shull et al. v. Bousman et al. (Gasoline spill damage)
- **Pflum, et al. v. Visteon, et al.**, Connersville, Indiana, December 2004 (PCB contamination of residences and land) Completed through Forrestal (Gene Stuard)
- **Rick Adcock, vs. Indianapolis International Airport & BAA** – 2006 (Determination of Diminutive Value regarding various properties in Hawthorne Ridge subdivision due to airport noise.)
- **Michigan & Holt Apartments** June 2006 (Neighboring PCB leak that migrated below apartment complex)
- **Cedar Park Subdivision**, April 2006 (Neighbor industrial leak below 150 unit partially completed residential subdivision.)
- **Capital Machines** (2/2006) Contaminated soil around industrial plant
- **Hesselbrock Farm** (5-2012) – Industrial spill on agricultural tract
- **Speedway, Gas America, Branch Bank, Used Car lot** (10-2012) – Contaminated sites in eminent domain
- **Contaminated Cleaners** – Hobart, Indiana & Warsaw, Indiana (6-2014)
- **Contaminated Residence** – Wheatfield, Indiana (8-2015) Oil spill

Highway Work

- **Rushville Highway Expansion** – December 2006 (multiple residential & commercial properties)
- **I-69 Mineral Rights** - May 2011 (Underground Gas Reservoir)
- **Yorktown Project** – December 2010 (Class action involving city setback)
- **US 31 Expansion** – June 2011 (complex properties -multiple units)

Large Assignments (property tax)

- **B.P. Refinery Plant, Whiting, Indiana** – (2005) Lake County Tax Appeal.
- **Duke, Lebanon, Indiana** (2007) Boone County Tax Appeal. (mega-warehouse)
- **US Steel, Gary, Indiana** – (2009) Lake County Tax Appeal.
- **Downing Publishing, Crawfordsville, Indiana** – (2009) Montgomery County Tax Appeal.
- **Mittal Steel (former Bethlehem Steel & Inland Steel), Gary, Indiana** – (2009) Lake County Tax Appeal.
- **Worthington Steel, Portage, Indiana** – (2010) Porter County Tax Appeal.
- **Cargill Processing Plan** (6-2012) Lake County Tax Appeal

Unusual

- **Martin Marietta** – July 2001 (testimony involving loss of property value due to proximity to mine blasting)
- **NONOS** – May 2005 (testimony involving loss of property value based on proximity to a Take Station)
- **Zionsville Transfer Station** – May 2004 (market value consequences of proximity to transfer station)
- **Eagle Pointe** – March 2005 (Property tax appeal involving an 850-unit housing project of the former Grissom AF Base)
- **Christmas Tree Farm & B&B**, August 2010 (Lending purposes)
- **Jefferson County Court House**, August 2012 (Valuation prior to fire damage)
- **Conservancy Districts (Wildwood, Graybrook & North Lake)** – 2009 matching US grant to repair dam
- **Landfill**
 - **Neal's Landfill** Bloomington, Indiana, September 2000 (Taylor v. CBS Corporation)
 - **Benton County Landfill**, Kentland, Indiana, April 2004 (Affidavit of Market Value for local homeowner's association.)
 - **Hancock County Landfill**, Morristown, Indiana – Partially closed, contaminated.
 - **Zionsville Transfer Station** – May 2004. Affidavit of market value consequences
 - **East Chicago Waterway** – May 2011, Proposed Contaminated Landfill, US Corps Army Engineers
- **Lake & Forest Club**, Brownstown, Indiana - June 2011 (Tax appeal on corporate owned lake with individual owned lake-front homes.)
- **Airports**
 - Purdue Airport – 1999 (Air easement after runway expansion)
 - Sheridan Airport – January 2005 (Lending purposes)
 - Alexandria Airport, Alexandria, Indiana – June 2006 (Lending purposes)
 - Gary Airport, Gary, Indiana – June 2010 (Exchange of land with Gary School Board)

Conservation Easement

- **Macy-Miller Agricultural Tract** – September 2001 (Title claim for missed conservation easement)
- **Shades State Park** – 2007-2010 (Multiple properties around the Shades State Park)
- **Hobart Conservation Easement** – 2010 (Golf Course Conservation Easement, IRS)
- **Detroit Riiverwalk** – 2011 (±1.5 mile walkway along the Detroit River in downtown Detroit)
- **Mead** – December 2012 (Conservation Easement on state chartered forest gift to County Park system)

AUTHORSHIP (Courses & Seminars)

Book:

- Indiana Real Estate Law and Practice Manual (1990; Revised – 1993)

Courses:

- Introduction to Real Estate Appraising Principles & Procedures (1/2004) – Access Education (IUPUI)
- Appraising the 2-4 Family Residence (1/2004) – Access Education (IUPUI)
- The Calculator Class (6/2004) – Access Education
- Appraising Complex Properties (2/2008) – Access Education (IFA – Russian Contingency)

Seminars:

- Real Estate Appraisals in Indiana (1995) Indiana Continuing Legal Education Foundation (ICLEF)
- Litigation Skills for the Appraiser: An Overview (6/1997) – Appraisal Institute
- Introduction to Environmental Issues for Real Estate Appraisers (2001) – Appraisal Institute
- Appraising Environmentally Contaminated Properties (2001) – Appraisal Institute
- Crossing the Line: Home Mortgage Fraud (9/2002) – Appraisal Institute
- Civil Rights, Real Estate and Valuation (1/2004) – Access Education (Realtors – Austrian Tour)
- Recognizing Relevant Environmental Issues (1/2004) – Access Education (Realtors – Austrian Tour)
- Indiana Agency Law and Buyer Agency (1/2004) – Access Education (Realtors – Austrian Tour)
- Creating the Right List Price (1/2004) – Access Education (Realtors – Austrian Tour)
- A Professional's Perspective on Predatory Lending (1/2004) – Access Education (Realtors – Austrian Tour)
- Laws, Ethics & Standards (5/2004) – Access Education (Wisconsin Online Appraisal CE)
- Procedures for the Unusual Residential Appraisal (5/2004) – Access Education (Wisconsin Online Appraisal CE)
- The Economics of Residential Finance (5/2004) – Access Education (Wisconsin Online Appraisal CE)
- Environmental and Disclosure Issues (5/2004) – Access Education (Wisconsin Online Appraisal CE)
- USPAP Basics for Clients (11/2006) – Access Education
- Valuation of Real Property in a Business Value Context (2005) ICLEF
- CMA, BPO, Appraisal – What's the Diff? (3/2006) – Access Education (Realtors – Italian Tour)
- Pricing Issues in Unusual Properties (3/2006) – Access Education (Realtors – Italian Tour)
- Current issues in Real Estate Brokerage (3/2006) – Access Education (Realtors – Italian Tour)
- Recognizing the Mold Issues in Listing Real Estate (3/2006) – Access Education (Realtors – Italian Tour)
- Introduction to Conservation Easement (2007) Access Education (The Nature Conservancy)
- Agricultural Conservation Easements (2009) Access Education (The Nature Conservancy)
- Real Estate Valuations (2008) Indiana Continuing Legal Education Foundation (ICLEF)
- Income Approach: Strengths, Weaknesses and Areas of Concern for Indiana Tax Appeals (2010) ICLEF
- Diversity in the Valuation Industry (2011) Appraisal Institute

APPROVED INSTRUCTOR (Courses & Seminars)

Indiana University (Part-time Instructor)

- Introduction to Real Estate Analysis (R-305)
- Real Estate Appraisal (R-440)
- Real Estate Finance/Investment Analysis (R-443)

Appraisal Foundation

- 15-hour USPAP
- 7-hour USPAP

Appraisal Institute

Partial List of Seminars Currently Authorized To Teach

- Litigation Skills for the Appraiser;
- Appraisal Curriculum Overview;
- Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book);
- Introduction to Conservation Easement Valuation, and
- Analyzing the Effects of Environmental Contamination on Real Property

Partial List of Courses Currently Authorized To Teach

- Basic Procedures
- Basic Principles
- Business Practices and Ethics

Professional Certificate Programs

- Review Designations
 - Appraisal Review – Residential Instructor
 - Appraisal Review – General Instructor
- Valuation of Conservation Easements:
- Litigation Appraising
 - The Appraiser as an Expert Witness: Preparation and Testimony
 - Litigation Appraising: Specialized Topics and Applications
 - Condemnation Appraising: Principles and Applications
 - Complex Litigation Appraisal Case Studies

Application No. _____
 Approval _____

ZA Fee _____
 Ad Fee _____
 To be paid to the Hendricks
 County Area Plan Commission
 must accompany this application.
 Receipt# _____

HENDRICKS COUNTY AREA PLAN COMMISSION
Application for Approval of Zoning Map Amendment

APPLICANT:

Name of Applicant Samuel T. Himsel Phone No. _____
 Address of Applicant 4230 N CR 200 W Fax No. _____
 City, State, Zip Danville, IN 46122 E-Mail _____

I (We) hereby apply for approval of a zoning classification change for the following described parcel of land in accordance with the provisions of the county regulations. I (We) am (are) the owner (the owners, the duly authorized agents or trustees for the owners) of the real estate included in said application for a zoning classification change. (Strike out words not applicable).

LOCATION OF PROPERTY: Approximately 1300 feet south of CR 350 N
on the west side of CR 425 W, Danville

TOWNSHIP Marion SECTION 23 TOWNSHIP 16N RANGE 2W

PARCEL NUMBER (S): 009-123622-400011

AREA (in acres): 58.42 ACRES NUMBER OF PARCELS 1

EXISTING ZONING CLASSIFICATION: AGR

PROPOSED ZONING CLASSIFICATION: AGI

EXISTING USE: AG tillable

PROPOSED USE: AG tillable & Combined Feeding Operation

SUPPORTING INFORMATION: See Procedural Guidelines

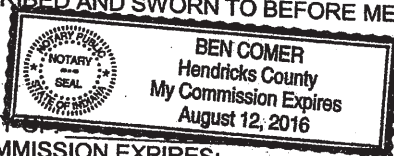
Name of Representative: Ben Comer, Comer Law Office, LLC
 Address: PO Box 207
 City, State, Zip: Danville, IN 46122 E-Mail bcomer@comerlaw.com
 Water Provider: Well Sewer Provider: septic

STATE OF INDIANA)
) SS:
 HENDRICKS COUNTY)

The undersigned, having been duly sworn, upon oath, says that the above information is true and correct as he is informed and believes.

Signature of Applicant Samuel T. Himsel
 Title of Applicant owner

SUBSCRIBED AND SWORN TO BEFORE ME THIS 4th DAY OF February, 2013.



NOTARY PUBLIC

COUNTY OF _____
 MY COMMISSION EXPIRES: _____

Electronic alteration of this form is prohibited.

Revised: December, 2008

PROPERTY INSPECTION RELEASE

REAL ESTATE AFFECTED: Section 23 Township 16 North Range 2 West

Township Marion

Location of Subject Property to Nearest County Road Intersection:

Approximately 1300 feet south of CR 350 N on the West side of CR 425 W

Address of Subject Property: _____

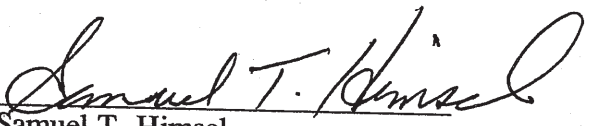
Town of _____ Lot _____ Block _____ Addition _____

Subdivision _____ Lot _____ Section _____

I hereby authorize and grant to the employees of the Hendricks County Planning and Building Department, other Hendricks County Officials, members of the Board of Zoning Appeals and members of the Plan Commission the right to come on to the above-described property for the purpose of inspecting and evaluating the premises regarding this application. I further release said Board members, Commission members, and County employees and officials from any and all liability during said inspection and related matters.

Date: Feb 4, 2013

Applicants:


Samuel T. Himsel

LEGAL DESCRIPTION
SAMUEL T. HIMSEL

58.42 acres by parallel lines off the South end of the following described parcel:

The West half of the Southeast quarter of Section 23 and also the East half of the East half of the Southwest quarter of said Section 23, all in Township 16 North of Range 2 West.



The Hendricks County
Quality Growth Strategy

App. 163

HENDRICKS COUNTY PLANNING & BUILDING DEPARTMENT

CERTIFICATION OF RECORD

I, Don Reitz on behalf of the Hendricks County Plan Commission having first been first duly sworn upon my oath, state the following:

I do hereby certify that I am in charge of and have custody of the records in this office and that the records that are attached hereto and incorporated herein are part of the complete record of the March 12, 2013 meeting/hearing of the Hendricks County Plan Commission in regard to rezoning petition ZA 418/13.

The copies of records for which this certification is made are true and complete reproductions of the original or digital records of the Hendricks County Plan Commission that are housed at the office of the Hendricks County Plan Commission located at 355 South Washington Street, #212, Danville, Indiana. The original records were made in the regular course of business, and it was the regular course of the Hendricks County Plan Commission to make the records at or near the time of the matter recorded.

I SWEAR OR AFFIRM UNDER THE PENALTIES FOR PERJURY that the foregoing representations are true to the best of my knowledge and belief.

HENDRICKS COUNTY PLAN COMMISSION

Date: 11-16-2016

Don Reitz
Director, Hendricks County Plan Commission

COPY

ORDINANCE NO. 2013-03

AN ORDINANCE TO AMEND THE ZONING MAP OF HENDRICKS COUNTY, FROM AGR/AGRICULTURE RESIDENTIAL DISTRICT TO AGI/AGRICULTURE INTENSE DISTRICT, COMMONLY KNOWN AS ZA 418/13: SAMUEL T. HIMSEL, S23-T16N-R2W, MARION TOWNSHIP, PARCEL TOTALING 58.42 ACRES, LOCATED ON THE WEST SIDE OF COUNTY ROAD 425 WEST, APPROXIMATELY 0.25 MILE SOUTH OF COUNTY ROAD 350 NORTH.

SECTION 1. Be it ordained by the Board of Commissioners of the County of Hendricks, Indiana, that the Zoning Ordinance (2008-16) adopted on the 12th day of August in the year 2008, be amended so as to include in the AGI/Agriculture Intense District, the following described real estate located in the County of Hendricks, Indiana, namely: ZA 418/13: Samuel T. Himself, S23-T16N-R2W, 58.42 acres, Marion Township, located on the west side of County Road 425 West, approximately 0.25 mile south of County Road 350 North.

SECTION 2. As inducement for this Zoning Map Amendment, all terms found in the conditions for approval of ZA 418/13: Samuel T. Himself, the "Findings of Fact/Law" attached hereto and made a part hereof, and the Hendricks County Board of Commissioners having relied on those stipulations and required certain conditions of its own, does hereby adopt said "Findings of Fact/Law" as a part of this Ordinance.

SECTION 3. All building or uses permitted and placed upon the described real estate shall fully conform with all the provisions of the County of Hendricks Zoning Ordinance and shall have obtained the proper permits.

SECTION 4. This Ordinance shall be in full force and effect from and after its passage by the County Commissioners.

Approved by the Board of County Commissioners of Hendricks County, Indiana, the 26TH day of MARCH, 2013.

Board of Commissioners

Phyllis A. Palmer
Phyllis A. Palmer, President

Bob Gentry
Bob Gentry, Vice-President

Matthew D. Whetstone
Matthew D. Whetstone, Member

Attest:

Cinda Kattau
Cinda Kattau, Auditor



The Hendricks County
Quality Growth Strategy

App. 165

HENDRICKS COUNTY PLANNING & BUILDING DEPARTMENT

CERTIFICATION OF RECORD

I, Don Reitz on behalf of the Hendricks County Plan Commission having first been first duly sworn upon my oath, state the following:

I do hereby certify that I am in charge of and have custody of the records in this office and that the records that are attached hereto and incorporated herein are part of the complete record of the March 12, 2013 meeting/hearing of the Hendricks County Plan Commission in regard to rezoning petition ZA 418/13.

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I SWEAR OR AFFIRM UNDER THE PENALTIES FOR PERJURY that the foregoing representations are true to the best of my knowledge and belief.

HENDRICKS COUNTY PLAN COMMISSION

Date: 11-16-2016

Don Reitz
Director, Hendricks County Plan Commission

ALLIANCE COURT REPORTING
P.O. BOX 78261
INDIANAPOLIS, INDIANA 46278-0261
(317) 875-3914
(877) 867-8600
www.alliancecourtreporting.com

A P P E A R A N C E S

FOR ALL PLAINTIFFS:

Kim E. Ferraro, Esq.
Sam Henderson, Esq.
HOOSIER ENVIRONMENTAL COUNSEL
407 E. Lincolnway, Suite A
Valparaiso, Indiana 46383
219.464.0104
kferraro@hecweb.org

FOR ALL DEFENDANTS:

Christopher J. Braun, Esq.
PLEWS SHADLEY RACHER & BRAUN, LLP
1346 North Delaware Street
Indianapolis, Indiana 46202
317.637-0711
cbraun@psrb.com

FOR SAMUEL T. HIMSEL:

Lynsey David, Esq.
LEWIS WAGNER, LLP
501 Indiana Avenue, Suite 200
Indianapolis, Indiana 46202
317.237-0500
ldavid@lewiswagner.com

I N D E X O F E X H I B I T S (C O N T I N U I N G)

Deposition Exhibit No:

**(Denotes exhibits marked in another deposition.)

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**19 - PQA Plus Certification Manual.....	149
**20 - Pork Issues Handbook (1999/2000).....	//
**21 - Free On-Farm Odor Assessments.....	//
**22 - Factsheet - Environmental for the Pork Industry.....	//
**23 - Siting and Building Design Considerations to Reduce Odor Potential from Swine Facilities.....	//
**24 - Wind Frequency Table (percentage) Indianapolis, IN.....	//
**25 - Mitigating Manure's Odor.....	//
**26 - 10 Steps to Manage Odor.....	//
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**29 - Affidavit of Notice of Public Hearing of Hendricks County Planning Commission.....	178
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Deposition Exhibit No.:

**(Denotes exhibits marked in another deposition.)

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** 8 - Manure Land Use Agreement dated 12/17/12.....	//
** 9 - Indiana Business Entity Report.....	//
**10 - Operating Agreement of 4/9 Livestock, LLC.....	//
**11 - Hastings Mutual Insurance Company Amended Declaration effective 10/01/14 through 10/01/15.....	//
**12 - Hastings Mutual Insurance Company Renewal Declaration effective 10/01/15 through 10/01/16.....	//
**13 - Hastings Mutual Insurance Company Amended Declaration effective 10/01/13 through 10/01/14.....	//
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I N D E X O F E X H I B I T S (C O N T I N U I N G)

Deposition Exhibit No:

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<p style="text-align: right;">Page 46</p> <p>1 of the contract growers of Co-Alliance?</p> <p>2 MR. BRAUN: I'll object only to the extent that</p> <p>3 it calls for speculation and assumes facts not in</p> <p>4 evidence; but subject to that, you can answer the</p> <p>5 question.</p> <p>6 A What was the question again?</p> <p>7 Q Would it be -- and you're right, I'm asking you to</p> <p>8 speculate to some extent, but given your -- you've</p> <p>9 got two contracts, one with Himsel farms, one now</p> <p>10 with 4/9 and you've seen this third one here which</p> <p>11 is -- as you put it, it was somewhat of a take it or</p> <p>12 leave it.</p> <p>13 Would it be your assumption that this would be</p> <p>14 sort of a form contract that Co-Alliance has with</p> <p>15 all of its contract growers?</p> <p>16 MR. BRAUN: Objection; call for speculation,</p> <p>17 lack of foundation, assumes facts not in evidence;</p> <p>18 but subject to that, you can answer the question if</p> <p>19 you know.</p> <p>20 A I don't know.</p> <p>21 MS. FERRARO: Sam, can you hold on to this for</p> <p>22 me.</p> <p>23 MR. HENDERSON: You don't have a folder.</p> <p>24 MS. FERRARO: Yeah, I don't have a folder for</p> <p>25 it. I just copied it off this.</p>	<p style="text-align: right;">Page 48</p> <p>1 lot of younger farmers that he may have talked to</p> <p>2 somebody that was already doing it at these little</p> <p>3 weekend outing things. I don't know. That's how</p> <p>4 they got the information.</p> <p>5 Q Okay. Did your brother David Himsel have any</p> <p>6 involvement in making that connection or providing</p> <p>7 the information?</p> <p>8 A No.</p> <p>9 Q Okay. Do you know how your sons found out about the</p> <p>10 weekend meeting or Co-Alliance meeting where they</p> <p>11 bring in young growers?</p> <p>12 A They just invite young couples for a fun weekend</p> <p>13 basically.</p> <p>14 Q Okay. So it would have been some sort of an</p> <p>15 announcement or invitation from Co-Alliance directly</p> <p>16 to Cory and Clint?</p> <p>17 A I suppose. I'm not positive on that, no; but</p> <p>18 understand I'm past the age group to be invited.</p> <p>19 Let's just put it that way.</p> <p>20 MR. BRAUN: I thought you were in your 30s.</p> <p>21 Q Yes. Okay. Why was it necessary to create a new</p> <p>22 business entity to construct this new CAFO?</p> <p>23 A Well, that's just basically just good business.</p> <p>24 Q So even though there was -- well, let me strike</p> <p>25 that.</p>
<p style="text-align: right;">Page 47</p> <p>1 Q Switch gears just a little bit.</p> <p>2 Whose idea was it to build the 4/9 CAFO to</p> <p>3 raise hogs for Co-Alliance?</p> <p>4 A My sons, Cory and Clint Himsel.</p> <p>5 Q When -- when did they come up with that idea?</p> <p>6 A Sometime in 2012. I'm not sure of the date.</p> <p>7 Q And they approached you with their idea?</p> <p>8 A Yes.</p> <p>9 Q Tell me about generally how that conversation went.</p> <p>10 A Well, Cory was the first one to mention something</p> <p>11 about it as an opportunity him and Clint might want</p> <p>12 to do, and I did some thinking on it and -- and some</p> <p>13 more thinking. Then we got together -- together and</p> <p>14 talked with some -- among ourselves again, and I</p> <p>15 said we'll investigate it. So that's -- that's kind</p> <p>16 of how it got started.</p> <p>17 Q Do you know how your sons found out that that was an</p> <p>18 opportunity that they might be able to take</p> <p>19 advantage of?</p> <p>20 A I think -- I think it was that Co-Alliance has a --</p> <p>21 where they bring in young growers and crop</p> <p>22 protection people and different things, and maybe</p> <p>23 Cory talked to Kevin Still. Kevin Still may have</p> <p>24 mentioned it to him or Cory may have heard it by</p> <p>25 somebody else. With these groups together there's a</p>	<p style="text-align: right;">Page 49</p> <p>1 The Himsel Brothers, as you said, was a -- is a</p> <p>2 partnership; but isn't it correct that there are</p> <p>3 some LLCs that have been created by either you or</p> <p>4 David or Stephen or in a combination as part of the</p> <p>5 Himsel Brothers operation?</p> <p>6 A No, that wouldn't be fair. We have no LLCs between</p> <p>7 me, Dave, Steve.</p> <p>8 Q First Quality Pork I believe is one I saw and</p> <p>9 HimselBrothers.com I think is another one on the</p> <p>10 Secretary of State website anyway.</p> <p>11 A Oh, those were just -- we were selling homegrown</p> <p>12 pork. That was -- I forgot about them, but I guess</p> <p>13 we did do that.</p> <p>14 Q Okay. Was it decided essentially at the same time,</p> <p>15 excuse me, that you and Cory and Clint agreed to</p> <p>16 construct a new CAFO to also create the LLC, the new</p> <p>17 LLC?</p> <p>18 A Run that by me again.</p> <p>19 Q Sure. Was the decision to create a new LLC made</p> <p>20 around the same time that the three of you decided,</p> <p>21 yeah, we're going to construct a new CAFO to raise</p> <p>22 Co-Alliance hogs? Was that -- were those two</p> <p>23 decisions made around the same time?</p> <p>24 A Yes.</p> <p>25 Q Okay. Excuse me. And that -- if I remember, I</p>

Page 50	Page 52
<p>1 believe you said that was sometime in November of</p> <p>2 2012, end of 2012?</p> <p>3 A Was that a question?</p> <p>4 Q Yes. I'm asking you to confirm that.</p> <p>5 A I think I said November earlier, but it could --</p> <p>6 sometime in that last -- let's say the last quarter</p> <p>7 of 2012. You know, I don't have -- don't recall an</p> <p>8 exact date.</p> <p>9 Q So after the decision -- had the meeting with</p> <p>10 Co-Alliance, your boys talked to you about doing</p> <p>11 this, there was a general consensus that, yeah, this</p> <p>12 was a good idea, what happened next to bring this</p> <p>13 all together?</p> <p>14 A Well, once we decided to kind of go -- go forward,</p> <p>15 I -- I think I -- well, I went down to Hendricks</p> <p>16 County Planning & Building and talked to the</p> <p>17 director Don Reitz about what -- what had to be</p> <p>18 done. I wasn't sure myself. What had to be done to</p> <p>19 build one -- build this facility.</p> <p>20 Q Okay. So you inquired as to potential zoning</p> <p>21 requirements and things like that with the County?</p> <p>22 A Yeah. I didn't really know there was a zoning</p> <p>23 requirement until he got the handbook out and we</p> <p>24 started going through it, and he said this -- and he</p> <p>25 laid out the steps. I used his professional advice</p>	<p>1 referring to the Ordinance?</p> <p>2 A The Comprehensive Plan.</p> <p>3 Q So I just want to make sure I'm clear, so -- and</p> <p>4 correct me if I'm wrong, you're the BZA member.</p> <p>5 Comprehensive Plan isn't actually a</p> <p>6 requirement; it's sort of a planning document, isn't</p> <p>7 it?</p> <p>8 A It's got the rules and regulations for what you can</p> <p>9 and can't do.</p> <p>10 Q Which would be the Ordinance itself?</p> <p>11 A It's -- yeah.</p> <p>12 Q Okay. So when you say "handbook", you're talking</p> <p>13 about the Ordinance?</p> <p>14 A Yes.</p> <p>15 Q Excuse me. Once you determine what you would need</p> <p>16 to do with respect to zoning, what happened after</p> <p>17 that?</p> <p>18 A Okay. We -- well, I -- I knew when I went in there</p> <p>19 it would have to be a property on the west of state</p> <p>20 road -- state highway 39 because in general I knew</p> <p>21 that any kind of livestock or anything like that has</p> <p>22 to be west of 39. They protected that part of the</p> <p>23 county for agriculture.</p> <p>24 Well, then so after I knew that, we -- that's</p> <p>25 what I did, yeah.</p>
Page 51	Page 53
<p>1 to -- well, this is what you're going to have to do</p> <p>2 and we'll get you started.</p> <p>3 Q Were you on the Board of Zoning Appeals at the time?</p> <p>4 A Yes.</p> <p>5 Q So after you -- I'm assuming you got your questions</p> <p>6 answered there in reaching out to -- I'm sorry,</p> <p>7 could you repeat the person's name that you spoke</p> <p>8 with?</p> <p>9 A Don Reitz.</p> <p>10 Q What's his position?</p> <p>11 A R-e-i-t-z.</p> <p>12 Q What is --</p> <p>13 A He's the director of Planning & Building for</p> <p>14 Hendricks County.</p> <p>15 Q You had a relationship with him in the past?</p> <p>16 A I've known him for several years. He's one of the</p> <p>17 best Planning & Building people that we've had in</p> <p>18 this county for a long, long time.</p> <p>19 Q And what did he tell you?</p> <p>20 A Well, he got the handbook out and we went through --</p> <p>21 like I said, went through -- well, he told me we'd</p> <p>22 have to get it rezoned and -- and there was some</p> <p>23 other things there, too; but I don't recall what</p> <p>24 exactly.</p> <p>25 Q Okay. And when you say "handbook", are you</p>	<p>1 Q Let me kind of break that out a little bit. So you</p> <p>2 determined that the area west of 39 was set aside</p> <p>3 for agriculture.</p> <p>4 When you say "set aside", you mean the County</p> <p>5 had -- that area was zoned for agricultural uses?</p> <p>6 A Yes.</p> <p>7 Q And then you considered property that you owned in</p> <p>8 that area?</p> <p>9 A Right.</p> <p>10 Q Okay. And then I understand you've got several</p> <p>11 parcels, you and your immediate family members own</p> <p>12 several parcels in the area.</p> <p>13 How was the particular parcel selected?</p> <p>14 A Well, a lot of things went into that. It was a --</p> <p>15 Number 1 it was a site that was away from our other</p> <p>16 farm buildings which for health reasons is a good</p> <p>17 place to put it. Then we used expert -- experts to</p> <p>18 help us pick the location.</p> <p>19 Q Okay. And I -- I want to clarify a few things.</p> <p>20 Clint and Cory testified that a preferred location</p> <p>21 that the three of you had decided on, the site where</p> <p>22 the 4/9 CAFO is, as the property that you would like</p> <p>23 to use; and once that had been decided, you</p> <p>24 consulted with experts to make sure that that site</p> <p>25 would comply with zoning and IDEM requirements; is</p>

1 that correct?

2 MR. BRAUN: Object; that misstates the

3 testimony of both Clint Himsel and Cory Himsel.

4 Subject to that, you can answer the question if you

5 know.

6 A I don't know.

7 MS. FERRARO: I'm not sure what I got wrong

8 about their testimony.

9 Q But I'll put -- certainly Clint testified that you

10 all had decided on that site as a preferred location

11 amongst the three of you and then you consulted with

12 your -- the various environmental consultants and

13 other people to determine if that site would meet

14 regulatory requirements and zoning requirements. Is

15 that not accurate?

16 MR. BRAUN: I'll object again. That misstates

17 Clint Himsel's testimony. He did not say they had

18 decided. They said they were considering that site.

19 Subject to that, you may answer the question.

20 A I -- say it one more time, your question, then

21 we'll --

22 Q Sure. Absolutely. It was my understanding from the

23 testimony -- and certainly I don't have it in front

24 of me right now, but it was my understanding from

25 Clint and Cory that the three of you had picked that

1 site where the CAFO is now as the preferred

2 location, the one that you would like to build the

3 CAFO on. And it was after deciding that, that you

4 then consulted with the experts, the consultants, to

5 determine whether or not that site would meet

6 regulatory requirements and zoning requirements?

7 MR. BRAUN: Again, subject -- it misstates the

8 testimony of Clint Himsel, but subject to that,

9 you're welcome to answer the question if you know.

10 A Yeah, that was the site we considered.

11 Q Were any other sites considered?

12 A No.

13 Q Okay.

14 A Not that I recall.

15 Q Okay. So putting it in your terms, that site was --

16 you can put it in any term you want to, but I'm --

17 what I'm hearing you saying is that this was a site

18 that the three of you thought would be the best

19 location, no other site was considered, and then you

20 consulted with your experts; is that correct?

21 A I'll take that back. We did look at another site

22 and did some measurements, and it wouldn't work

23 there. I mean so we said, well, we'll consider this

24 one and consider the site we ended up using and get

25 some experts and do all the stuff.

1 Q Okay. Why was that other site that you -- first of

2 all, where was -- what -- what other site was

3 considered?

4 A It was another property I own.

5 Q Where is it at?

6 A Oh, it's in -- it was close to -- on the same

7 property that my other finisher is located, but

8 there's no way it would work there.

9 Q Is that because of the health of the animals issue?

10 A Yes, and too close to a stream and just different

11 things.

12 Q Okay. And so then the second site was the current

13 site?

14 A Yeah.

15 Q And then after selecting that one as this is

16 probably going to be the best site, then you reached

17 out to the consultants?

18 A Yes.

19 Q Correct?

20 A Yes.

21 Q Okay. We're going to get there. When was -- when

22 was the decision -- strike that.

23 Who decided on the type of operation and the

24 number of hogs that would be -- that the buildings

25 would be built to contain?

1 A The three of us: Sam, Cory and Clint.

2 Q Why was 8,000 hogs as opposed to some other number

3 decided upon?

4 A I think we picked 8,000. It could have been four,

5 eight, whatever; but we picked eight because once

6 you get everything laid out, the second building --

7 you got -- you got to have all this stuff for one

8 building so you might as well just put two and be

9 done with it.

10 Q Was that a recommendation from Co-Alliance?

11 A No.

12 Q Was that a recommendation from any of your

13 consultants?

14 A We consulted Bellar the builder. He gave us some

15 recommendations on that.

16 Q On the number of buildings to build?

17 A Yeah, yes.

18 Q That helped inform your decision about the number of

19 hogs?

20 A Right.

21 Q Okay. And how did you -- who referred you to Bellar

22 Construction?

23 A He -- somebody from Co-Alliance had mentioned his

24 name to us.

25 Q Was it your understanding that Bellar Construction

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<p>1 that's the extent.</p> <p>2 Q When -- what was the period of time that he did --</p> <p>3 that Pete did that?</p> <p>4 A From 1970 to -- 'til it closed in -- no, no, until</p> <p>5 about 19 -- to about 2000, roughly 2000.</p> <p>6 Q Pete no longer works for Co-Alliance?</p> <p>7 A He passed away.</p> <p>8 Q Oh, my apologies. My condolences.</p> <p>9 THE WITNESS: Big rats.</p> <p>10 MS. FERRARO: Huh?</p> <p>11 THE WITNESS: I said some big rats.</p> <p>12 MS. FERRARO: Yeah. No kidding.</p> <p>13 Q Was the initial -- was part of the intent of</p> <p>14 constructing a new CAFO with 8,000 hogs to expand</p> <p>15 the production capacity of Himself Brothers?</p> <p>16 A No.</p> <p>17 Q If you could give me one second. If you could take</p> <p>18 a look at Exhibit 5. Found it?</p> <p>19 A Yes.</p> <p>20 Q Going to the second page you'll see under the</p> <p>21 heading Swine and Animal Nutrition --</p> <p>22 MS. FERRARO: Oh, let me identify this</p> <p>23 document. Exhibit 5 is the Co-Alliance Board</p> <p>24 meeting minutes for March 28, 2013.</p> <p>25 Q And going to the second page you'll see underneath</p>	<p>1 much. I think it's fair to say that it's -- it --</p> <p>2 it's not Himself Brothers farms.</p> <p>3 Q Okay. So this is incorrect? In other words, my</p> <p>4 interpretation that Himself Farms is not Himself</p> <p>5 Brothers farms. It's the 4/9 facility and they just</p> <p>6 got it wrong here; is that right?</p> <p>7 A Yeah, to the original -- ask me again, the original</p> <p>8 question. Is this form wrong?</p> <p>9 Q This -- this statement Himself Farms will be</p> <p>10 constructing two new quad buildings approved by</p> <p>11 zoning this week is not an accurate statement,</p> <p>12 correct?</p> <p>13 A Correct.</p> <p>14 Q Okay. If you could take a look at Exhibit 6. Do</p> <p>15 you have that in front of you?</p> <p>16 A Yes, ma'am.</p> <p>17 Q Are these your notes?</p> <p>18 A Yeah.</p> <p>19 Q Could you explain the context of why and when you</p> <p>20 took these notes.</p> <p>21 A The second page has to do with the soybeans that</p> <p>22 I -- Syngenic soybeans I sell. That has nothing to</p> <p>23 do with the hog thing.</p> <p>24 Q Okay. And what about the first page of notes?</p> <p>25 A Just going to take a second here.</p>
Page 63	Page 65
<p>1 the heading Swine and Animal Nutrition, about midway</p> <p>2 through, that Himself Farms will be constructing two</p> <p>3 new quads buildings which were just approved at</p> <p>4 zoning this week.</p> <p>5 Do you see that?</p> <p>6 A Yes.</p> <p>7 Q It doesn't say 4/9 or Sam Himself or Cory or Clint?</p> <p>8 MR. BRAUN: You can't write on that.</p> <p>9 THE WITNESS: Put my pen down. Sorry.</p> <p>10 Q Would it be fair to say that Himself Farms is Himself</p> <p>11 Brothers farms?</p> <p>12 A No.</p> <p>13 Q Do you have any reason -- do you have any</p> <p>14 understanding why the Co-Alliance Board would have</p> <p>15 said that Himself Farms would be constructing the two</p> <p>16 quad buildings?</p> <p>17 A No. It -- no, I don't have --</p> <p>18 Q That would be incorrect?</p> <p>19 A Let me read it one more time.</p> <p>20 Q Sure. Take your time.</p> <p>21 A The question -- what was the question again?</p> <p>22 Q That that statement that Himself Farms will be</p> <p>23 constructing two new quad buildings approved by</p> <p>24 zoning this week, that is an incorrect statement?</p> <p>25 A It's a -- maybe I'm thinking this through too -- too</p>	<p>1 Q No problem. Take your time.</p> <p>2 A Well, that just has to do with some notes I made</p> <p>3 for -- as we mentioned earlier, we talked about in</p> <p>4 2'04 or 5 Dave got the nurseries and one finisher</p> <p>5 and I got one finisher, and this is just dividing up</p> <p>6 the responsibilities of different places and who</p> <p>7 would help do what --</p> <p>8 Q Okay.</p> <p>9 A -- as a general farm.</p> <p>10 Q So this has nothing to do with deciding who is going</p> <p>11 to help with the new 4/9 Livestock CAFO?</p> <p>12 A No.</p> <p>13 Q Okay. There -- do you know why you produced this</p> <p>14 document in response to my office's discovery</p> <p>15 request in this case?</p> <p>16 A Well, when we first got this, I have a folder I kept</p> <p>17 all the stuff in for when we started this project,</p> <p>18 and my filing is not the best and I just kind of</p> <p>19 threw it in there and then I didn't get a chance to</p> <p>20 go through it because it all happened so fast when</p> <p>21 we got the news break about being sued. I just</p> <p>22 handed this over to Chris and his office copied some</p> <p>23 stuff.</p> <p>24 Q Okay. Fair to say these notes don't have --</p> <p>25 A No.</p>

<p style="text-align: right;">Page 66</p> <p>1 Q -- anything to do with the 4/9 facility? Okay. I</p> <p>2 just wanted to confirm that.</p> <p>3 Take a look at Exhibit 3 again. Do you have</p> <p>4 that in front of you?</p> <p>5 A Yes.</p> <p>6 Q If you look at the second paragraph this states --</p> <p>7 just to identify it, Exhibit 3 is a letter of intent</p> <p>8 signed by Ben Comer who is your attorney, correct?</p> <p>9 A Yes.</p> <p>10 Q And it states -- and he was your attorney helping</p> <p>11 you -- representing you before the Hendricks County</p> <p>12 Plan Commission on the rezoning application,</p> <p>13 correct?</p> <p>14 A Yes, ma'am.</p> <p>15 Q He states here that -- that the "Petitioner</p> <p>16 currently has four (4) hog barns located on three</p> <p>17 (3) different sites in Center Township." Do you see</p> <p>18 that?</p> <p>19 A Which paragraph is that?</p> <p>20 MR. BRAUN: Right here (indicating).</p> <p>21 Q Sure.</p> <p>22 A Yeah. Oh, yeah, I see.</p> <p>23 Q Yeah. And that the existing facilities have been in</p> <p>24 operation for many years, and were started under the</p> <p>25 prior Zoning Ordinance that allowed feeding</p>	<p style="text-align: right;">Page 68</p> <p>1 (Whereupon a recess was taken from 11:02 a.m.</p> <p>2 to 11:15 a.m.)</p> <p>3 MS. FERRARO: Thank you for the break.</p> <p>4 Mr. Himself, one second. Let me mark this</p> <p>5 Exhibit 59. If you could pass this down to her.</p> <p>6 (Whereupon Deposition Exhibit 59 was marked for</p> <p>7 identification by Ms. Ferraro.)</p> <p>8 Q Mr. Himself, I'm showing you Exhibit 59 which is a</p> <p>9 document I obtained from the Environmental</p> <p>10 Protection Agency's Environmental Compliance -- I'm</p> <p>11 sorry, Enforcement Compliance History Office I</p> <p>12 believe is what ECHO stands for, I could be wrong</p> <p>13 about that, indicating that in April of 2006 Himself</p> <p>14 Brothers signed on to the -- what was called the</p> <p>15 Animal Feeding Operation Air Compliance Agreement.</p> <p>16 Do you recall Himself Brothers signing on to the</p> <p>17 EPA Air Quality Consent Agreement?</p> <p>18 A No.</p> <p>19 Q In the case summary it says that Himself Brothers</p> <p>20 participated in EPA's Animal Feeding Operation Air</p> <p>21 Compliance Agreement described as a voluntary</p> <p>22 consent agreement to minimize emissions from certain</p> <p>23 Animal Feeding Operations and to ensure those</p> <p>24 operations comply with the Clean Air Act, the</p> <p>25 Comprehensive Environmental Response, Compensation</p>
<p style="text-align: right;">Page 67</p> <p>1 operations within the base ag zoning district.</p> <p>2 Do you see that?</p> <p>3 A Yes.</p> <p>4 Q Excuse me. Given that this is the application for</p> <p>5 4/9 and he's referring to existing facilities, 4/9</p> <p>6 didn't have existing facilities, right? It hadn't</p> <p>7 been created yet?</p> <p>8 A Correct.</p> <p>9 Q And I guess that's what led me to think that</p> <p>10 potentially Himself Brothers was looking to expand,</p> <p>11 and that's why the existing facilities presumably is</p> <p>12 the Himself Brothers operation?</p> <p>13 A That could have been worded better.</p> <p>14 Q But --</p> <p>15 A I'll agree with that.</p> <p>16 Q It's your testimony that Himself Brothers, that was</p> <p>17 not the intent is to expand the capacity of Himself</p> <p>18 Brothers?</p> <p>19 A No.</p> <p>20 Q It was always intended to be a completely separate</p> <p>21 deal?</p> <p>22 A Correct.</p> <p>23 MS. FERRARO: I would love to take another</p> <p>24 quick break.</p> <p>25 MR. BRAUN: Sure.</p>	<p style="text-align: right;">Page 69</p> <p>1 and Liability Act or CERCLA and the Emergency</p> <p>2 Planning and Community Right-to-Know Act or EPCRA.</p> <p>3 Does that refresh your recollection?</p> <p>4 A No.</p> <p>5 Q Would David Himself have been the person that signed</p> <p>6 this agreement on behalf of Himself Brothers?</p> <p>7 A I don't see any signatures.</p> <p>8 Q Right. This is a case report about the Civil</p> <p>9 Enforcement Action indicating that Himself Brothers</p> <p>10 was part of that -- was the respondent in that Civil</p> <p>11 Enforcement Case. And I don't -- I've requested</p> <p>12 documents from your counsel about this and don't</p> <p>13 have it, but it -- EPA would presumably not identify</p> <p>14 Himself Brothers in this manner if the Civil</p> <p>15 Enforcement Case had not occurred.</p> <p>16 A When you say civil --</p> <p>17 MR. BRAUN: Is there a question pending?</p> <p>18 Q Yes. I was asking if David Himself would have been</p> <p>19 the one that represented Himself Brothers, for lack</p> <p>20 of a better word, in signing on to this EPA Air</p> <p>21 Compliance Agreement?</p> <p>22 A I don't know.</p> <p>23 Q Do you have any reason to disagree with the EPA that</p> <p>24 this occurred?</p> <p>25 MR. BRAUN: Object only to the extent of lack</p>

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<p>1 Q And then the number of 1,250 hogs to 2,200 hogs is</p> <p>2 the threshold number estimated to emit 100 pounds of</p> <p>3 ammonia per day. Do you see that?</p> <p>4 A Yes.</p> <p>5 Q The 4/9 CAFO has 8,000 hogs, correct?</p> <p>6 A Yes.</p> <p>7 Q According to this table, it would be way over the</p> <p>8 threshold number of animals to be emitting --</p> <p>9 presumed to emit more than 100 pounds of ammonia per</p> <p>10 day?</p> <p>11 MR. BRAUN: Objection; again lack of</p> <p>12 foundation, document speaks for itself. You're now</p> <p>13 drawing legal conclusions from a document that will</p> <p>14 be determined by a fact-finder and/or use of an</p> <p>15 expert who is not present with us today. The</p> <p>16 witness already testified he's never seen this</p> <p>17 document before. Reading it has not jogged his</p> <p>18 memory. Subject to that, you can answer the</p> <p>19 question if you know.</p> <p>20 A What was the question?</p> <p>21 Q Sure. At least according to this table prepared by</p> <p>22 Purdue University it indicates that a livestock</p> <p>23 facility with finishing pigs and a deep pit with</p> <p>24 more than 1,250 hogs would be estimated to emit more</p> <p>25 than 100 pounds of ammonia per day, correct?</p>	<p>1 That's what you've testified, that you have not seen</p> <p>2 this document.</p> <p>3 A No.</p> <p>4 Q I'm asking you to confirm that that's what the table</p> <p>5 says.</p> <p>6 MR. BRAUN: Again, same objection. If you want</p> <p>7 to call as a witness one of the authors of this</p> <p>8 document to verify the accuracy and allow for</p> <p>9 appropriate cross-examination, but this witness is</p> <p>10 not qualified to confirm or deny the accuracy of the</p> <p>11 information. Beyond that, the document speaks for</p> <p>12 itself. Subject to that, you can answer the</p> <p>13 question.</p> <p>14 Q And I'm not asking you to confirm the accuracy of</p> <p>15 the information, only that the table says what it</p> <p>16 says.</p> <p>17 MR. BRAUN: Same objection.</p> <p>18 A I don't have an answer.</p> <p>19 Q It's a pretty simple question, Mr. Himsel. Your</p> <p>20 attorney has objected. The objection is noted for</p> <p>21 the record. I am -- I am entitled to an answer to</p> <p>22 my question.</p> <p>23 Does the table say what I said it said?</p> <p>24 A What did you say it said?</p> <p>25 Q Okay. Under Table 2 it states under livestock</p>
Page 83	Page 85
<p>1 MR. BRAUN: Same objection.</p> <p>2 Q At least according to this table.</p> <p>3 MR. BRAUN: Again, you're asking this witness</p> <p>4 to vouch for a document and table he's not seen</p> <p>5 before today. He has no idea as to the accuracy of</p> <p>6 the information contained herein. Calls for</p> <p>7 speculation. Subject to that, if you can -- if you</p> <p>8 can verify and vouch for this document, you're</p> <p>9 welcome to answer the question.</p> <p>10 A No comment.</p> <p>11 Q Well --</p> <p>12 MR. BRAUN: She needs an answer.</p> <p>13 A No then.</p> <p>14 Q No, the table doesn't indicate that a livestock</p> <p>15 facility with finishing pigs and a deep pit with</p> <p>16 more than 1,250 hogs would be estimated by the EPA</p> <p>17 to emit 100 pounds of ammonia per day? The table</p> <p>18 doesn't say that?</p> <p>19 MR. BRAUN: Same objection. The document</p> <p>20 speaks for itself. Subject to that, you can answer</p> <p>21 the question.</p> <p>22 A If I'm answering to what this table says, then I</p> <p>23 guess I have no knowledge, how's that, that this is</p> <p>24 right.</p> <p>25 Q I understand you have not seen this document.</p>	<p>1 emission rates that preliminary estimates of the</p> <p>2 number of livestock that's likely to emit 100 pounds</p> <p>3 of ammonia per day based on maximum daily emission</p> <p>4 rates from the combination of the building and the</p> <p>5 manure storage include a facility with finishing</p> <p>6 pigs, a deep pit and more than 1,250 hogs?</p> <p>7 MR. BRAUN: Again, same objection; lack of</p> <p>8 foundation. The witness has testified he's never</p> <p>9 seen this document before today. The document</p> <p>10 speaks for its. This witness is not qualified to</p> <p>11 vouch for the accuracy of the information. Again,</p> <p>12 the document speaks for itself. Subject to that, if</p> <p>13 you can answer the question, you're welcome to.</p> <p>14 A What do they mean by deep pit?</p> <p>15 Q Well, you confirmed for me earlier that 4/9</p> <p>16 Livestock has a deep pit.</p> <p>17 MR. BRAUN: I'll -- I'll -- in addition to the</p> <p>18 previous, I'll object on the ground of relevancy.</p> <p>19 This is from 2005 time period. There's been no</p> <p>20 establishment that these regulations are in -- are</p> <p>21 applicable in 2013 or beyond. Subject to that,</p> <p>22 again if you know, you can answer the question.</p> <p>23 Q Mr. Himsel, I'm simply asking you to agree that</p> <p>24 that's what this table says. All of the objections</p> <p>25 that your counsel are making is noted for the</p>

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<p>1 A I don't think we provided you with that number. I</p> <p>2 think you made up that number.</p> <p>3 Q Okay. If you could look at Exhibit 35, please.</p> <p>4 MR. BRAUN: Here (indicating).</p> <p>5 Q Okay. This is a document produced by 4/9 Livestock.</p> <p>6 It's Bates stamped 4/9 001869. At the top it's</p> <p>7 called Manure Application Planning 4/9 Livestock,</p> <p>8 LLC Manure Produced Per Year, and then it gives a</p> <p>9 calculation of 8,000 finishing pigs times .18 cubic</p> <p>10 feet per day equals 1,440 cubic feet per day. You</p> <p>11 go down to the end of those calculations and it</p> <p>12 gives you a total of 3 -- 3,942,000 gallons per</p> <p>13 year. This is a document you produced.</p> <p>14 THE WITNESS: We produced this document?</p> <p>15 MR. BRAUN: Yes.</p> <p>16 A Okay. What's the question?</p> <p>17 Q My question is is that isn't it accurate that the</p> <p>18 4/9 Livestock produces several million gallons of</p> <p>19 year -- several millions gallons of manure a year to</p> <p>20 which you disagreed with that, so now I'm asking you</p> <p>21 to confirm that it's estimated that the 4/9</p> <p>22 Livestock facility produces roughly 3.9 million</p> <p>23 gallons of manure every year?</p> <p>24 MR. BRAUN: I'll object only to the extent that</p> <p>25 the calculations set forth therein is to the maximum</p>	<p>1 itself. Forget about the numbers just for --</p> <p>2 A No, I don't.</p> <p>3 Q Well, could it have been one of your consultants?</p> <p>4 A I was looking at the wrong thing. I don't know -- I</p> <p>5 don't know who prepared it.</p> <p>6 Q Well, assuming it was prepared by one of your</p> <p>7 consultants, would you have any reason to disagree</p> <p>8 with your consultants?</p> <p>9 A No.</p> <p>10 Q Okay. And if it -- if you prepared it, is that what</p> <p>11 you're having trouble with? You think maybe you</p> <p>12 prepared it?</p> <p>13 A No.</p> <p>14 Q Okay. You think -- who else would have prepared</p> <p>15 this document besides your consultants or you or</p> <p>16 Clint or Cory?</p> <p>17 A We -- we obviously did. So ask me the question</p> <p>18 again. Is this -- is this a massive amount of</p> <p>19 manure? Is that what you want to know?</p> <p>20 Q Actually the question was is it accurate that 3.9</p> <p>21 million gallons of manure are estimated to be</p> <p>22 produced by the 4/9 Livestock facility every year?</p> <p>23 A Yes, I guess. Yeah.</p> <p>24 MS. FERRARO: Okay. Now we can go to lunch.</p> <p>25 MR. BRAUN: Okay. Off the record.</p>
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<p>1 quantity based on the permit. Subject to that, you</p> <p>2 may answer the question.</p> <p>3 Q Well, and I just want to -- you know, this was --</p> <p>4 these are not my calculations, these are yours</p> <p>5 submitted to a --</p> <p>6 A I understand that.</p> <p>7 Q -- public agency, and I'm just asking you to confirm</p> <p>8 your own figures?</p> <p>9 A I'm having trouble -- having trouble doing that, so</p> <p>10 my answer is no.</p> <p>11 Q So the -- do you know who prepared this?</p> <p>12 A Huh?</p> <p>13 Q Do you know who prepared this document?</p> <p>14 A No, I don't. Well --</p> <p>15 MR. BRAUN: Why don't you let us do this: Why</p> <p>16 don't you let us talk about it at lunch and we'll</p> <p>17 come back --</p> <p>18 MS. FERRARO: No. I want -- I want to settle</p> <p>19 this before we go to lunch.</p> <p>20 A Does anybody have a calculator I can use?</p> <p>21 Q I'd like an answer to my question, Mr. Himsel. Do</p> <p>22 you know who prepared this document on your behalf?</p> <p>23 A It must have been -- I'll let you know in a minute.</p> <p>24 MR. BRAUN: No, not the calculation. She wants</p> <p>25 to know do you know who prepared the document</p>	<p>1 (Whereupon a lunch break was taken from</p> <p>2 12:23 p.m. to 1:32 p.m.)</p> <p>3 Q Did you have a nice lunch, Mr. Himsel?</p> <p>4 A Yes.</p> <p>5 Q Okay. Great.</p> <p>6 A Did you?</p> <p>7 Q We'll plow on through. We did. We went to the</p> <p>8 Mayberry Cafe. It's one of my favorite Danville</p> <p>9 restaurants.</p> <p>10 All right. So I would just like to go over a</p> <p>11 little bit of ground that we somewhat covered just</p> <p>12 to clarify. The partnership that you have with your</p> <p>13 brothers, the Himsel Brothers farm, as a partnership</p> <p>14 would you agree that you have a shared duty with</p> <p>15 your brothers to manage that business?</p> <p>16 A Yes.</p> <p>17 Q And recognizing that is a -- that it is a</p> <p>18 partnership, there is a division of responsibility</p> <p>19 among the three of you, correct?</p> <p>20 A Yes.</p> <p>21 Q But generally the three of you, given that the</p> <p>22 actions of the other could implicate you personally</p> <p>23 as a partner, you would keep each other informed of</p> <p>24 substantial occurrences that would affect the</p> <p>25 business, correct?</p>

<p style="text-align: right;">Page 158</p> <p>1 A Not to my knowledge.</p> <p>2 Q So fair to say that prevailing wind direction was</p> <p>3 not considered in selecting an appropriate site?</p> <p>4 A I think that -- well, the wind changes directions</p> <p>5 every day, so prevailing, I'm not sure exactly what</p> <p>6 that is.</p> <p>7 Q Fair to say prevailing wind direction was not</p> <p>8 considered as a factor?</p> <p>9 A I'm not sure if -- if one of the consultants helped</p> <p>10 us with that or not.</p> <p>11 Q Mr. Himsel, my question is it's not listed here, and</p> <p>12 I asked you if this is an exhausting -- exhaustive</p> <p>13 list; you indicated that it is.</p> <p>14 So is it fair to presume that prevailing wind</p> <p>15 direction was not a factor in selecting an</p> <p>16 appropriate site?</p> <p>17 A I'm trying to see -- I don't know.</p> <p>18 Q Is it listed here?</p> <p>19 A Well, I read through it real quickly. I thought I</p> <p>20 knew them all. It's not specifically listed, but it</p> <p>21 doesn't -- yeah, it's not listed.</p> <p>22 Q These are your sworn answers to interrogatories,</p> <p>23 correct?</p> <p>24 A Yeah.</p> <p>25 Q Okay. It's not listed so fair to say it was not</p>	<p style="text-align: right;">Page 160</p> <p>1 potential off-site odor and air emission impacts was</p> <p>2 not used to determine appropriate setbacks?</p> <p>3 A Not to my knowledge.</p> <p>4 Q Okay. Well, this is your answer to interrogatories.</p> <p>5 You --</p> <p>6 MR. BRAUN: He said -- go ahead and finish your</p> <p>7 question.</p> <p>8 Q If it's not here in your answers, unless you have</p> <p>9 knowledge otherwise, I can rely that this is an</p> <p>10 accurate answer, correct?</p> <p>11 A Correct.</p> <p>12 Q Okay. And similar -- similarly because it's not</p> <p>13 listed, the National Pork Board's recommended</p> <p>14 best -- I'm sorry, recognized best management</p> <p>15 practices for siting and building design to minimize</p> <p>16 the potential that odors and air emissions would</p> <p>17 impact neighbors were not considered either?</p> <p>18 MR. BRAUN: I'll object to the extent that it's</p> <p>19 misstating Page 13 where it says the factors</p> <p>20 including but not limited to the following and the</p> <p>21 witness's testimony reflects that; and also the</p> <p>22 witness' testimony that he relied upon the experts</p> <p>23 and he is not familiar with what the experts</p> <p>24 considered. Subject to that, you can answer the</p> <p>25 question.</p>
<p style="text-align: right;">Page 159</p> <p>1 considered, correct?</p> <p>2 A Well, it was considered but who knows which way the</p> <p>3 wind is going to blow, but --</p> <p>4 Q Mr. Himsel, my question was prevailing wind</p> <p>5 direction considered or not, yes or no?</p> <p>6 A No, not on this particular thing.</p> <p>7 Q This particular thing are your sworn answers to</p> <p>8 interrogatories. Is this answer that you gave</p> <p>9 accurate?</p> <p>10 A Yes.</p> <p>11 Q Okay. And prevailing wind direction is not listed</p> <p>12 here, correct?</p> <p>13 A Correct.</p> <p>14 Q So is it safe -- fair to assume -- fair to conclude</p> <p>15 that prevailing wind direction was not a factor</p> <p>16 considered in selecting a site for the 4/9 CAFO?</p> <p>17 A Yes.</p> <p>18 Q Okay. Similarly since it's not listed, is it fair</p> <p>19 to assume that a verified computer model for</p> <p>20 assessing potential off-site odor and air emission</p> <p>21 impacts was not used to determine appropriate</p> <p>22 setbacks from neighboring residents including the</p> <p>23 Himsels and the Lannons?</p> <p>24 A No, we used the County standards.</p> <p>25 Q Okay. So a verified computer model for assessing</p>	<p style="text-align: right;">Page 161</p> <p>1 A And you asked me if -- I forget what you asked me</p> <p>2 exactly, the exact verbiage.</p> <p>3 MS. FERRARO: Can you read the question,</p> <p>4 please.</p> <p>5 (Whereupon a portion of the record was read</p> <p>6 back by the court reporter.)</p> <p>7 A We left that up to the experts to guide us through</p> <p>8 on that.</p> <p>9 Q And just to be clear, we talked about earlier that</p> <p>10 you and Clint and Cory had settled on a -- on the</p> <p>11 current site as the preferred location before</p> <p>12 reaching out to your consultants, right?</p> <p>13 MR. BRAUN: Objection; misstates the witness'</p> <p>14 testimony as well as the testimony of Clint and Cory</p> <p>15 Himsel. Subject to that, you're welcome to answer</p> <p>16 the question.</p> <p>17 A No, we hadn't -- I think I said -- stated earlier we</p> <p>18 used the experts in our -- before we did make the</p> <p>19 final decision.</p> <p>20 Q Well, and certainly in your picking the current site</p> <p>21 before you reached out to the experts, you didn't</p> <p>22 consult the National Pork Board or look at the</p> <p>23 brochures that they had on best management</p> <p>24 practice -- practices for siting and building design</p> <p>25 to minimize odor air -- odor and air emission</p>

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<p>1 impacts on neighbors, correct?</p> <p>2 A I wasn't aware of them.</p> <p>3 Q How do you know that your consultants considered</p> <p>4 those factors?</p> <p>5 A Well, Mr. Veenhuizen and, oh, Mr. Bellar and JBS,</p> <p>6 I'm sure they -- we relied on them for that</p> <p>7 information.</p> <p>8 Q Right. But in preparing your answer to that</p> <p>9 interrogatory, how do you know that those were the</p> <p>10 factors that your consultants considered?</p> <p>11 A Well, you got to put things in the people you hire,</p> <p>12 and that was part of their -- I'm sure they were</p> <p>13 aware of it, their knowledge, first-hand knowledge.</p> <p>14 And if they would have said something different, we</p> <p>15 probably would have done something different.</p> <p>16 Q Mr. Himsel, my question is when you answered those</p> <p>17 interrogatories and you came up with that list of</p> <p>18 factors, how did you know that those were the</p> <p>19 factors your consultants considered? Did they tell</p> <p>20 you? Did they help you answer those</p> <p>21 interrogatories?</p> <p>22 A We assumed that our experts were helping us locate</p> <p>23 the barn. If you don't hear any bad news, you think</p> <p>24 things are all right. So that's what I went with.</p> <p>25 Q And my question, Mr. Himsel, is when you answered</p>	<p>1 decisions on the site of the building, and JBS</p> <p>2 United environmental services. If there would have</p> <p>3 been -- like I said, if there would have been a</p> <p>4 problem, we would have done something different.</p> <p>5 Q Maybe we can tackle this a different way. Clint</p> <p>6 testified the other day that there were two factors</p> <p>7 that essentially you and Cory and he considered in</p> <p>8 coming up with kind of the preferred site. I'm not</p> <p>9 sure why that's a bad term. But you picked, among</p> <p>10 the three of you, the current site as the place that</p> <p>11 you would like to have it; and in reaching that</p> <p>12 particular -- or making that decision, you had</p> <p>13 considered the existing Himsel Brothers farms'</p> <p>14 facilities. You recognized, as you testified</p> <p>15 earlier, that you didn't want to have the CAFO to be</p> <p>16 too close to those facilities because of animal</p> <p>17 health issues, and I believe the other factor that</p> <p>18 he mentioned was the existence of fields for manure</p> <p>19 application.</p> <p>20 A Right.</p> <p>21 Q And that those were two factors that the three of</p> <p>22 you considered, and the rest of those were really</p> <p>23 factors that the consultants had to consider because</p> <p>24 of IDEM considerations or zoning requirements. Does</p> <p>25 that --</p>
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<p>1 your interrogatories and you specifically gave me</p> <p>2 that answer there with the listing of factors, my</p> <p>3 question is how did you come up with that list of</p> <p>4 factors? How did you know that those were the</p> <p>5 factors that your consultants considered?</p> <p>6 A Well, they -- it says limited but not -- but not</p> <p>7 limited to these factors, so we assumed that we let</p> <p>8 the experts help us on the rest of it.</p> <p>9 Q We're going to be here an awfully long time,</p> <p>10 Mr. Himsel. I'm not trying to trick you up here.</p> <p>11 I'm just trying to understand how you came up with</p> <p>12 that list of factors.</p> <p>13 Did you ask your consultants what they</p> <p>14 considered in coming up with that list? Did your</p> <p>15 attorneys help you answer that? How do you know</p> <p>16 that those are the factors that your consultants</p> <p>17 considered?</p> <p>18 A We came up with a lot of these and then we let --</p> <p>19 kind of showed them the location and then we had no</p> <p>20 reason not to use them.</p> <p>21 Q So these were factors that you asked them to</p> <p>22 consider?</p> <p>23 A We went with the -- Mr. Bellar, JBS and</p> <p>24 Mr. Veenhuizen to help us but also we relied -- we</p> <p>25 relied on various persons and entities to make</p>	<p>1 A Fair.</p> <p>2 Q -- sound reasonable?</p> <p>3 A (Affirmative nod).</p> <p>4 Q Okay. So I understand how -- the two factors that</p> <p>5 the three of you considered, the existence of the</p> <p>6 Himsel Brothers farm and the availability of land</p> <p>7 application areas in providing your answer to me in</p> <p>8 the interrogatory answers. What I don't understand</p> <p>9 is how you came up with the list of these other</p> <p>10 factors that the consultants considered.</p> <p>11 And my very -- I'm trying to be real succinct.</p> <p>12 The question is did you consult -- did you ask the</p> <p>13 consultants what factors they considered when coming</p> <p>14 up with the list or is this -- did your attorneys</p> <p>15 come up with the list? How did you come up with the</p> <p>16 set of factors here?</p> <p>17 A It was mostly -- like Clint said, it was property I</p> <p>18 owned. It was in a good location.</p> <p>19 Q Do you know if your consultants relied on any</p> <p>20 authorities or resources in coming up with those</p> <p>21 siting factors?</p> <p>22 A I don't know.</p> <p>23 Q Okay. You're aware that IDEM doesn't regulate odor</p> <p>24 or air emissions from Confined Animal Feeding</p> <p>25 Operations, right?</p>

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<p>1 A Right.</p> <p>2 Q So you knew that simply complying with IDEM</p> <p>3 regulations and zoning requirements wouldn't address</p> <p>4 any odor or air quality issues for neighbors if they</p> <p>5 were to arise, correct?</p> <p>6 A There's under the -- right. I guess we -- we</p> <p>7 were -- the Right to Farm law was protecting us</p> <p>8 there, too, I assumed.</p> <p>9 Q Well, talk to me about that. How is the Right to</p> <p>10 Farm law protecting you?</p> <p>11 A Well, I say that but then the lady from -- I think</p> <p>12 the -- there's no way of knowing -- of regulating</p> <p>13 air quality. That's what we heard at the hearing</p> <p>14 that evening.</p> <p>15 Q What hearing are you talking about?</p> <p>16 A The Planning Commission meeting, but we -- yeah.</p> <p>17 What was your question to me?</p> <p>18 Q Well, I was trying to understand what you meant by</p> <p>19 we were covered by the Right to Farm Act. And then</p> <p>20 you said something about an EPA person or some woman</p> <p>21 at a meeting talking about -- I don't understand</p> <p>22 what your answer was either, but my -- my question</p> <p>23 is I'd like to understand what you meant by we were</p> <p>24 covered by the Right to Farm Act.</p> <p>25 A Maybe I misspoke. I don't know.</p>	<p>1 asked and answered. The witness said he misspoke.</p> <p>2 Subject to that, you can answer the question if you</p> <p>3 have any further response.</p> <p>4 Q Could it be that you understood that the Right to</p> <p>5 Farm Act allowed you to create nuisance odors, for</p> <p>6 lack of a better term, odors that might impact your</p> <p>7 neighbors but you could do that because the Right to</p> <p>8 Farm Act allowed you to? Is that what you meant by</p> <p>9 that?</p> <p>10 A No.</p> <p>11 Q Do you know what the Right to Farm Act is?</p> <p>12 A I can't recall.</p> <p>13 MS. FERRARO: Okay. Can we take a brief break,</p> <p>14 Chris?</p> <p>15 MR. BRAUN: Sure.</p> <p>16 (Whereupon a recess was taken from 3:25 p.m. to</p> <p>17 3:41 p.m.)</p> <p>18 Q If you could pull out Exhibit 16.</p> <p>19 A (Witness complies).</p> <p>20 Q You got it?</p> <p>21 A Yeah.</p> <p>22 Q All set? Okay.</p> <p>23 MS. FERRARO: For the record, Exhibit 16 is a</p> <p>24 February 5, 2013 letter from Kevin Still, President</p> <p>25 and CEO of Co-Alliance to the Hendricks County Plan</p>
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<p>1 Q You don't know what you just meant by that</p> <p>2 statement?</p> <p>3 A Well, we knew you could farm. You -- I'm a little</p> <p>4 bit confused right at the moment. You asked me</p> <p>5 what?</p> <p>6 Q You just made a statement that -- in my question to</p> <p>7 you about IDEM not regulating odors and air</p> <p>8 emissions from Confined Feeding Operations, you said</p> <p>9 that the Right to Farm Act covered that, and I want</p> <p>10 to know what you meant by that?</p> <p>11 A That we could build there is what I meant.</p> <p>12 Q Okay. And how does --</p> <p>13 A We was --</p> <p>14 Q I'm sorry, go ahead.</p> <p>15 A It was -- I was trying to -- we were talking about</p> <p>16 location and IDEM, that IDEM doesn't control air</p> <p>17 quality. That's what we were worried about was --</p> <p>18 we knew that so that's -- that's all I'm going to</p> <p>19 say about that.</p> <p>20 Q And my question though, Mr. Himself, is what did</p> <p>21 the -- how was the Right to Farm Act covering that?</p> <p>22 A I don't know.</p> <p>23 Q You don't know what you meant by that statement?</p> <p>24 A Uh-uh.</p> <p>25 MR. BRAUN: Objection; the question has been</p>	<p>1 Commission.</p> <p>2 Q You've seen this document before?</p> <p>3 A Yeah, yes.</p> <p>4 Q Is it fair to say that by the time this letter was</p> <p>5 sent to the Hendricks County Plan Commission, that</p> <p>6 the site where the 4/9 CAFO would be built had been</p> <p>7 selected?</p> <p>8 A I'm not sure. I think so.</p> <p>9 Q Well, you notice that it lists, "I'm writing to</p> <p>10 you" --</p> <p>11 A Oh, yeah.</p> <p>12 Q -- "in support of" -- do you see that there?</p> <p>13 A Yeah.</p> <p>14 Q The answer to the question is yes, okay.</p> <p>15 A Yes.</p> <p>16 Q Is it also fair to say that the general terms of the</p> <p>17 hog production contract with Co-Alliance had been</p> <p>18 agreed to?</p> <p>19 A Yes.</p> <p>20 Q The letter states that Co-Alliance will own the hogs</p> <p>21 and Sam Himself will act as Co-Alliance's contract</p> <p>22 grower. Do you see that?</p> <p>23 A Yeah, that's what he said, yes.</p> <p>24 Q And so the -- the contract with Co-Alliance</p> <p>25 initially envisioned you being the contract owner as</p>

1 after that, it would be ready by May 14th.

2 Q Let me rephrase the question. Was the fact that --

3 was the date of the IDEM application and then

4 subsequent IDEM approval important for some other

5 thing that would need to happen? In other words --

6 in other words was there other decision-making that

7 hinged on the IDEM approval?

8 A Well, it would be -- it was just kind of maybe the

9 timeline of when we could start if everything else

10 was going as planned as far as I know.

11 Q Was it something that the bank needed to have in

12 place for the loan? Was it something Co-Alliance

13 needed to have in place before they would start --

14 enter into the contract. I mean --

15 A I don't --

16 Q You don't -- you just don't remember?

17 A I don't know.

18 Q Okay. If you could pull out Exhibit 29, please.

19 A (Witness complies).

20 Q And also pull out Exhibit 30. We can talk about

21 both of them.

22 A You said 29 and 30?

23 Q Yes, sir. All set?

24 A Yeah.

25 Q Have you seen these documents before?

1 A I'm sure I have, yeah.

2 Q Okay. Just for the record -- I'm sorry, I didn't

3 mean to interrupt. Please. Were you not finished?

4 A Yeah, I've -- I've seen them.

5 Q Okay.

6 A 29 at least.

7 Q So Exhibit 29 for purposes of the record is an

8 Affidavit of Notice of Public Hearing of the

9 Hendricks County Planing Commission signed by Ben

10 Comer and dated February 8, 2013, right?

11 A Uh-huh.

12 Q That's what it is, correct?

13 A Right.

14 Q "Yes"?

15 A All right. Sorry.

16 Q No, we just got to make clear what we're talking

17 about.

18 And Exhibit 30 is a March 1, 2013 letter from

19 Ben Comer to landowners notifying them of the

20 March 12, 2013 public hearing, correct?

21 A Uh-huh. Okay.

22 Q And per the affidavit in Exhibit 29 it appears that

23 effected utilities, schools and towns received more

24 than 30 days notice of the public hearing of

25 March 12, 2013, right?

1 A Yeah, yes.

2 Q On the other hand, affected landowners received 11

3 days notice, less if you account for mail; is that

4 right?

5 A It's dated March 1st, yeah.

6 Q Okay.

7 A It must have been --

8 Q Is there any reason why notice -- direct notice to

9 affected landowners couldn't have been sent at the

10 same time as the notice to utilities, schools and

11 towns?

12 A I don't know why it was sent at a different time.

13 It must have been within the limit but it was also

14 advertised. No -- yeah. I don't know.

15 Q You said you know it was advertised. Are you

16 talking about the notice in the newspaper?

17 A Yeah, and it was also -- there's a sign.

18 Q Do you know when the sign was put up?

19 A Not definitely; not off of top of my head, no.

20 Q Thirty days or closer to the hearing?

21 A At least 30 days.

22 Q And how about --

23 A Whatever the Plan Commission -- Planning & Building

24 put that sign up. They would have put it up in

25 plenty of time.

1 Q Do you know when the public notice went out in the

2 newspaper?

3 A I think it was -- not off the top of my head.

4 Q Okay. You're aware of what -- as a BZA member what

5 the notice requirements are for public hearings like

6 this; is that correct?

7 A Well, it's two different groups. For -- for -- I

8 know for Board of Zoning Appeals but not maybe so

9 much for the Plan Commission. It's two different

10 groups.

11 Q Were you aware that the affected landowners would

12 get less time than public distance schools,

13 utilities and towns, that they would get less

14 notice?

15 A No, I -- I assumed the plan had been -- Mr. Comer

16 was doing it. I relied on him to -- he does this

17 all the time to know the -- the proper times to get

18 them mailed out.

19 Q The people who live in close proximity in the

20 immediate area of the 4/9 CAFO have been neighbors

21 of yours for quite some time, many of them have,

22 correct?

23 A Not the landowners but -- are you switching gears

24 here, or the landowners?

25 Q Yes, your neighbors, the neighbors to the 4/9

1 facility.
 2 A Yeah.
 3 Q Were you concerned given your longstanding
 4 relationships with some of these people that they
 5 receive adequate notice of your plans?
 6 A No, I -- I -- I stopped in and told Barbara Bates,
 7 and the Barkers knew and the Hardins knew, so --
 8 Q But as to the others, Lawsons, Combs?
 9 A They were sent these letters because they're not
 10 adjoining landowners.
 11 Q I understand. That wasn't my question though.
 12 Other than the requirements that you -- you know,
 13 that apply to notice, did you, as a neighbor for
 14 people -- many of the people that you have known for
 15 quite a long time, did you have a concern that they
 16 know of your plans, that they get adequate notice of
 17 your plans?
 18 A I assumed that they got adequate notice through
 19 Mr. Comer, the Planning & Building and that they --
 20 they got their notices as scheduled.
 21 Q But you didn't --
 22 A As required, I'm sure they did.
 23 Q Okay. And going to the -- I know you're looking to
 24 the last page of the Exhibit 29 and then the second
 25 page of Exhibit 30, these are the people and

1 organizations that got direct notice of the rezoning
 2 application, right?
 3 A It was in Mr. Comer's hands to make sure that that
 4 was done correctly.
 5 Q Yes. Thank you. My question was though this list
 6 in both exhibits represent the people or
 7 organizations representing affected utilities,
 8 schools and towns that actually received direct
 9 notice of your rezoning application, right?
 10 A Yeah.
 11 Q And of the list of actual residents who would be
 12 living within a close distance of the CAFO, only two
 13 were given actual notice other than your son --
 14 well, actually Clinton lives further away. Is that
 15 correct, there was only really two neighbors.
 16 MR. BRAUN: Well, I'll object only to the
 17 extent the question is a bit vague and ambiguous.
 18 When you say "direct", are you talking about a
 19 letter written to them or public notice by the sign
 20 and newspaper just so we're clear on what notice
 21 you're talking about?
 22 MS. FERRARO: That's fine. I indicated direct
 23 notice by --
 24 MR. BRAUN: By letter.
 25 MS. FERRARO: -- by letter.

1 MR. BRAUN: Okay.
 2 A All these people are -- are land -- their land
 3 touches where this was going to be. Clint owns some
 4 property close in that same field so that's why got
 5 one, and then Bates and Barkers and Hardins and the
 6 Hardin Trust.
 7 Q Thank you. My question though, so just to clarify,
 8 John and Vicki Hardin actually don't live there
 9 though. They own property that is adjacent to the
 10 4/9 --
 11 A Uh-huh.
 12 Q -- CAFO, but their residence is further away,
 13 correct?
 14 A Right.
 15 Q And Clint, your son, he owns property that's there
 16 but he doesn't actually live there, right?
 17 A Right.
 18 Q And Cory does live there. He -- so but he's also an
 19 owner and clearly knew about this already since he
 20 was part of 4/9?
 21 A Yeah.
 22 Q So that leaves two families that actually got direct
 23 notice by mail of the rezoning application, right?
 24 A That's what's required as far as I know.
 25 Q Irrespective, just "yes" or "no"?

1 A Yes.
 2 Q Two more questions on these documents and then we
 3 can move on from there.
 4 You're looking at the -- if you look at
 5 Exhibit~30, it states that the landowners, the two
 6 landowners that received this actual direct notice,
 7 they were advised to go to the Planning and Building
 8 Department if they wanted to examine the petition to
 9 rezone, right?
 10 A Yes.
 11 Q And the more distant utilities, schools and towns
 12 were actually provided a copy of the petition,
 13 right?
 14 A Yeah. That must be the rules of the -- that's
 15 right.
 16 Q Is there any reason why you couldn't have provided
 17 your petition to those two landowners irrespective
 18 of the rules?
 19 A I didn't -- I -- I assumed that Mr. Comer was going
 20 to take care of it by the rules. No, I didn't --
 21 maybe I didn't even realize that they weren't going
 22 to get it, but I had Mr. Comer taking care of it,
 23 so --
 24 Q I guess I'm -- you know, I'm thinking about how I
 25 might handle the situation with people that I've

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<p>1 A Have I heard of that?</p> <p>2 Q Uh-huh.</p> <p>3 A Yes.</p> <p>4 Q Place of refuge, a place that you go for privacy to</p> <p>5 escape, a place that's yours?</p> <p>6 A (Affirmative nod).</p> <p>7 Q That's why we have property rights that are</p> <p>8 protected, right? You're aware of that?</p> <p>9 A Yeah, yes.</p> <p>10 Q Most people take pride in their homes? It's</p> <p>11 something that because it's a major investment, they</p> <p>12 take care of it?</p> <p>13 MR. BRAUN: Objection; calls for speculation.</p> <p>14 Subject to that, you may answer the question.</p> <p>15 A I'll say yes.</p> <p>16 Q Would you agree that for most people who aren't in</p> <p>17 the livestock business knowing that a Confined</p> <p>18 Animal Feeding Operation with 8,000 hogs that would</p> <p>19 produce 3.9 million gallons of hog waste next to</p> <p>20 their house would be a legitimate concern?</p> <p>21 MR. BRAUN: I'll object. You're asking this</p> <p>22 witness to testify as to what most people might</p> <p>23 think as to a CAFO involvement; calls for</p> <p>24 speculation. Subject to that, you may answer the</p> <p>25 question.</p>	<p>1 foundation, improper hypothetical, calls for</p> <p>2 speculation. Subject to that, you may answer the</p> <p>3 question.</p> <p>4 A My representative, Ben Comer, followed all the rules</p> <p>5 of the notifications.</p> <p>6 Q If the developer of such an industrial facility was</p> <p>7 nevertheless complying with all the rules and</p> <p>8 regulations but you had concerns nevertheless, would</p> <p>9 you want that developer to listen and take your</p> <p>10 concerns seriously?</p> <p>11 MR. BRAUN: Objection; again, lack of</p> <p>12 foundation, improper hypothetical, relevancy</p> <p>13 questions -- relevancy objection. Subject to that,</p> <p>14 you may answer the question.</p> <p>15 A Would you mind saying that again. I get -- would</p> <p>16 you mind saying that again. It was kind of noisy.</p> <p>17 MS. FERRARO: That's okay. Can you read the</p> <p>18 question, please.</p> <p>19 (Whereupon a portion of the record was read</p> <p>20 back by the court reporter.)</p> <p>21 MR. BRAUN: Same objection. Subject to that,</p> <p>22 you may answer the question.</p> <p>23 A I know -- I know that they had the right to appeal</p> <p>24 anything that was confirmed.</p> <p>25 Q How do you know that they would have a right to</p>
Page 191	Page 193
<p>1 A I don't know.</p> <p>2 Q Taken outside of the livestock arena if an</p> <p>3 industrial operation such as a cement plant or steel</p> <p>4 mill or oil refinery, some industrial facility</p> <p>5 that's known to produce noxious odors and air</p> <p>6 emissions were moving next to your home, would you</p> <p>7 want to know about it?</p> <p>8 MR. BRAUN: Objection; lack of foundation,</p> <p>9 improper hypothetical. Subject to that, you may</p> <p>10 answer the question if you know.</p> <p>11 A I don't know.</p> <p>12 Q You don't know? You wouldn't -- you don't know if</p> <p>13 you would want to have all the information to</p> <p>14 understand how an industrial operation known to</p> <p>15 produce noxious odors and air emissions, how that</p> <p>16 would impact you? You don't know whether you would</p> <p>17 want to know about that?</p> <p>18 MR. BRAUN: Again, objection; lack of</p> <p>19 foundation. Subject to that, you may answer the</p> <p>20 question.</p> <p>21 A I don't know.</p> <p>22 Q Okay. In such a situation you wouldn't want</p> <p>23 sufficient time to understand how it might impact</p> <p>24 you or your family and your property values?</p> <p>25 MR. BRAUN: Again, objection; lack of</p>	<p>1 appeal?</p> <p>2 A Well, if a -- anything that goes through the</p> <p>3 Planning & Building or the Board of Zoning Appeals</p> <p>4 or whatever, any vote has -- the people have the</p> <p>5 right to appeal the decision.</p> <p>6 Q Do you know what's involved in bringing such an</p> <p>7 appeal?</p> <p>8 A Hire an attorney and talk to the Planning & Building</p> <p>9 people or just go down and talk to them yourself and</p> <p>10 file an appeal.</p> <p>11 Q Hiring an attorney can be costly, right?</p> <p>12 A Yeah.</p> <p>13 Q Do you know how much time an individual gets to file</p> <p>14 such an appeal after a decision has been made to</p> <p>15 rezone property?</p> <p>16 A Not for sure. I don't know. I know there is a</p> <p>17 proper time to appeal.</p> <p>18 Q Does 30 days sound right?</p> <p>19 A I don't know for sure.</p> <p>20 Q Okay. Suffice it to say you felt that the onus was</p> <p>21 on them to appeal if they didn't like what you were</p> <p>22 proposing as opposed to you talking with them up</p> <p>23 front and addressing their concerns?</p> <p>24 A I just know they had the right to appeal.</p> <p>25 Q Did you take your neighbors' concerns that they</p>

<p style="text-align: right;">Page 194</p> <p>1 addressed at the March 12, 2013 hearing seriously?</p> <p>2 A I listened to the positives and the negatives.</p> <p>3 Q Right. But --</p> <p>4 A And -- and I left it to -- to the Plan Commission to</p> <p>5 vote, and they apparently agreed 6-0 that it was a</p> <p>6 good decision.</p> <p>7 Q Thank you. My question though is of the people who</p> <p>8 raised concerns, the people who lived in the area</p> <p>9 that raised concerns -- and I'm paraphrasing. We</p> <p>10 can go look at the transcript if you'd like -- but</p> <p>11 after reviewing it several times over the course of</p> <p>12 the last few days, the main concerns were odors,</p> <p>13 concern for odors, air quality issues, land property</p> <p>14 devaluation as a result and basically a reduced</p> <p>15 quality of life because of odors and air emissions.</p> <p>16 So given --</p> <p>17 Is that your recollection of concerns raised at</p> <p>18 the hearing?</p> <p>19 A Yes.</p> <p>20 Q Did you take those concerns seriously?</p> <p>21 A Yes.</p> <p>22 Q Did you follow up with any of the people who</p> <p>23 expressed concerns at the hearing and talk with them</p> <p>24 personally to talk through their concerns with them?</p> <p>25 A No.</p>	<p style="text-align: right;">Page 196</p> <p>1 is that fair?</p> <p>2 A Yes.</p> <p>3 Q I'm showing you Exhibit 62.</p> <p>4 (Whereupon Deposition Exhibit 62 was marked for</p> <p>5 identification by Ms. Ferraro.)</p> <p>6 Q This is an email that you produced or 4/9 produced,</p> <p>7 I'm sorry, Exhibit 62 dated March 9, 2013 which</p> <p>8 would have been three days prior to the public</p> <p>9 hearing.</p> <p>10 Do you recognize this email?</p> <p>11 A Yes.</p> <p>12 Q You sent this to Dale Kruse, your consultant,</p> <p>13 correct?</p> <p>14 A Right.</p> <p>15 Q In the email you state you just happened to be at</p> <p>16 Long Horn restaurant tonight and saw a guy whose son</p> <p>17 just bought property next to Debbie (comma) (comma)</p> <p>18 T. She is organizing whole damn road beside south</p> <p>19 of us. Will you be at the meeting? I guess we</p> <p>20 better get our people there. I hope you did not</p> <p>21 give Walt anything. If that bitch thinks a nice</p> <p>22 state of the arts complex will bring her property</p> <p>23 values down, wait until I put a free range shithole</p> <p>24 right next to her house that she can do nothing</p> <p>25 about four exclamation marks. Talk about smell,</p>
<p style="text-align: right;">Page 195</p> <p>1 Q Why not?</p> <p>2 A They had -- they had their option to appeal the</p> <p>3 decision. I left it up to that.</p> <p>4 THE REPORTER: What was that last part?</p> <p>5 MR. BRAUN: He left it up to that.</p> <p>6 Q Well, for example do you recall that David Lawson</p> <p>7 expressed concerns at that hearing, right?</p> <p>8 A Yes.</p> <p>9 Q You know David Lawson?</p> <p>10 A Yes.</p> <p>11 Q For quite some time?</p> <p>12 A Yeah, yes.</p> <p>13 Q His wife Sally was your son's teacher?</p> <p>14 A Uh-huh.</p> <p>15 MR. BRAUN: You need an audible response.</p> <p>16 A I said yeah. Yes. I'll quit slurring. Yes.</p> <p>17 Q And he raised concerns that his property values</p> <p>18 would be impacted, that he had asked for more time</p> <p>19 to consider what you were proposing? After hearing</p> <p>20 his concerns, you didn't follow up with him to talk</p> <p>21 with him personally about that?</p> <p>22 A I don't remember. I don't recall talking to Dave --</p> <p>23 David Lawson after.</p> <p>24 Q So basically as long as you were complying with the</p> <p>25 requirements, that was all you had to do; is that --</p>	<p style="text-align: right;">Page 197</p> <p>1 rodents and flies she hasn't seen anything yet.</p> <p>2 My question is is that the guy whose son just</p> <p>3 bought an empty lot next to Debbie (comma) (comma)</p> <p>4 T? Who is that?</p> <p>5 A That was -- I can't remember his name right off, but</p> <p>6 in the meantime he sold that lot to someone else.</p> <p>7 Q You had a conversation with this guy?</p> <p>8 A Yeah. His son wanted to move -- move back closer to</p> <p>9 town or he decided to sell. They sold it and</p> <p>10 there's a new house going up there right now at that</p> <p>11 lot.</p> <p>12 Q So in this email you are relaying, excuse me, what</p> <p>13 you learned from this guy to your consultant Dale</p> <p>14 Kruse; is that right?</p> <p>15 A Say -- say that again.</p> <p>16 Q Yeah. You're relaying what you learned from your</p> <p>17 conversation with this guy, whoever he is, to your</p> <p>18 consultant, Dale Kruse?</p> <p>19 A Yeah.</p> <p>20 Q Essentially you learned that your neighbor, Debbie</p> <p>21 (comma) (comma) T, was opposed to your proposal to</p> <p>22 build an 8,000 head hog CAFO and she was organizing</p> <p>23 the other neighbors in opposition, right?</p> <p>24 A Right.</p> <p>25 Q And you understood in -- and you were relaying that</p>

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<p>1 at this time.</p> <p>2 Q But what did you mean by let's get our people there?</p> <p>3 What was the intent of that?</p> <p>4 MR. BRAUN: I'm going to object. The question</p> <p>5 has been asked and answered three times. The</p> <p>6 witness has testified he doesn't recall what people</p> <p>7 he was referring to. Subject to that, if you have</p> <p>8 anything further to add, you're welcome to answer.</p> <p>9 A I have nothing further.</p> <p>10 Q You state to your consultant Mr. Kruse that I hope</p> <p>11 you did not give Walt anything. Who is Walt?</p> <p>12 A I don't know at this time.</p> <p>13 Q What were you concerned that your environmental</p> <p>14 consultant might give to Walt?</p> <p>15 A I don't -- I don't recall. I don't recall who Walt</p> <p>16 exactly is or --</p> <p>17 Q Is he a member of the Plan Commission or County</p> <p>18 Commissioners?</p> <p>19 A No.</p> <p>20 Q Is he one of the neighbors? You don't remember?</p> <p>21 A I don't remember.</p> <p>22 Q What were you concerned that Walt would do, whoever</p> <p>23 he is, if Mr. Kruse gave him some information that</p> <p>24 you didn't want Walt to have?</p> <p>25 A I don't recall.</p>	<p>1 sanitary like what we're doing now.</p> <p>2 Q So you agree that livestock farms can produce</p> <p>3 unpleasant smells and attract rodents and flies?</p> <p>4 A Not new CAFOs can't -- don't.</p> <p>5 Q Livestock farms -- traditional livestock farms</p> <p>6 though can produce unpleasant smells and attract</p> <p>7 rodents and flies?</p> <p>8 A It would be a lot more, yes.</p> <p>9 Q Don't CAFOs raise significantly more animals and</p> <p>10 produce substantially more waste than traditional</p> <p>11 farms?</p> <p>12 A Yes, but it's controlled.</p> <p>13 Q Were you referring to the substantially more numbers</p> <p>14 of animals and more waste that would be produced at</p> <p>15 a CAFO when you said, "talk about smell, rodents and</p> <p>16 flies she hasn't seen anything yet"?</p> <p>17 A No.</p> <p>18 Q Why would Debbie Konter not have recourse if you</p> <p>19 built an offensive, smelly livestock farm right next</p> <p>20 to her house?</p> <p>21 A Well, I would never do it but it is a permitted use</p> <p>22 in agra residential.</p> <p>23 Q Is that because you'd be protected from Indiana's</p> <p>24 Right to Farm law?</p> <p>25 A I have no idea.</p>
Page 203	Page 205
<p>1 Q In the email you threatened to put a free range</p> <p>2 shithole right next to her house in retaliation for</p> <p>3 her organizing that you exclaim with four</p> <p>4 exclamation marks that she could do nothing about.</p> <p>5 You were -- you're referring to a traditional</p> <p>6 livestock farm where animals are raised out in</p> <p>7 pasture instead of in a CAFO. Is that what you mean</p> <p>8 by a free range shithole?</p> <p>9 MR. BRAUN: Objection; the question has been</p> <p>10 asked and answered; but subject to that, you can --</p> <p>11 MS. FERRARO: That's the first time I've asked</p> <p>12 that question.</p> <p>13 MR. BRAUN: He's already testified there's a 20</p> <p>14 sow operating unit that would be put there. But</p> <p>15 subject to that, you can -- if you have additional</p> <p>16 information to add, you're welcome to add it.</p> <p>17 Q I'm sorry, I missed that answer. What do you --</p> <p>18 A Well, while ago I said -- while ago I was talking I</p> <p>19 could have put a free range couple hog houses and 20</p> <p>20 sows and let -- let sows -- let it all outside right</p> <p>21 next to her without any permits or anything else.</p> <p>22 Q Why do you think such farms are shitholes? Do you</p> <p>23 find them offensive?</p> <p>24 A Well, that's the way we used to raise hogs and it</p> <p>25 was a lot harder work, a lot more -- not clean and</p>	<p>1 Q Is the fact that it's a permitted use and you can do</p> <p>2 it, is that why you didn't have to take her concerns</p> <p>3 seriously?</p> <p>4 A No.</p> <p>5 Q Mr. Himsel, isn't it true that you knew you could</p> <p>6 build a CAFO with as many animals as you wanted and</p> <p>7 there was nothing Debbie or the other neighbors</p> <p>8 could do because of the Right to Farm Act?</p> <p>9 A No.</p> <p>10 Q That's not what you meant earlier when you said</p> <p>11 we've got everything covered with the Right to Farm</p> <p>12 Act?</p> <p>13 A No.</p> <p>14 Q How long have you been a member of the BZA?</p> <p>15 A I think since the fall of 1995.</p> <p>16 Q So you were a BZA member at the time you were</p> <p>17 seeking to rezone your property?</p> <p>18 A Yes.</p> <p>19 Q I think we might have covered this, but you were</p> <p>20 familiar with the 2008 Zoning Ordinance and its</p> <p>21 provisions as a BZA member?</p> <p>22 A Yes.</p> <p>23 Q So you've known that the County has recognized since</p> <p>24 at least 2008 that CAFOs may emit intense odors and</p> <p>25 air pollution, correct?</p>

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<p>1 A No.</p> <p>2 Q If you could turn to -- pull out Exhibit 34.</p> <p>3 A (Witness complies).</p> <p>4 Q Turn to the last page which is 4-17.</p> <p>5 A (Witness complies)</p> <p>6 Q Are you there?</p> <p>7 A Yeah.</p> <p>8 Q My apologies. I meant to send you to Page 4-15. Up</p> <p>9 at the top do you see where it says District Intent?</p> <p>10 A Yes.</p> <p>11 Q This is the intent of the County for creating the</p> <p>12 Agriculture Intense Zoning District, or the AGI</p> <p>13 District, right?</p> <p>14 A Yeah, uh-huh.</p> <p>15 Q And it states this district, the AGI district,</p> <p>16 serves to provide adequate and appropriate locations</p> <p>17 for intense agricultural uses such as CAFOs or</p> <p>18 agricultural businesses that may emit intense odors,</p> <p>19 vibrations, air pollution or other disruptions. The</p> <p>20 intent is to protect both the agricultural use and</p> <p>21 residential or commercial property owners from</p> <p>22 nuisance claims.</p> <p>23 Do you see that?</p> <p>24 A Yes.</p> <p>25 Q Is that the answer to my prior question that at</p>	<p>1 (Whereupon a portion of the record was read</p> <p>2 back by the court reporter.)</p> <p>3 MR. BRAUN: I also object to the extent it</p> <p>4 misstates the district's intent. Subject to that,</p> <p>5 you can answer question.</p> <p>6 A Yeah. The intent of having the agricultural AGI</p> <p>7 zoning for the County was to protect the farmer to</p> <p>8 be able to do what he wants to do with his land.</p> <p>9 Q Is that what it states here under District Intent?</p> <p>10 A Well, that's the way I read it.</p> <p>11 Q You -- you read that district intent is -- the</p> <p>12 language this intent -- this district serves to</p> <p>13 provide adequate and appropriate locations for</p> <p>14 intense agricultural uses such as CAFOs or</p> <p>15 agricultural businesses that may emit intense odors,</p> <p>16 vibrations, air pollution or other disruptions as</p> <p>17 being that it's creating places where farmers can do</p> <p>18 what they want with their land?</p> <p>19 A It protects the west side of the county for</p> <p>20 agriculture.</p> <p>21 Q Does it say that here in the District Intent?</p> <p>22 MR. BRAUN: I'll object only again to the</p> <p>23 extent that Exhibit 34 is only a partial component</p> <p>24 of the Hendricks County Comprehensive Plan of 2008.</p> <p>25 Subject to that, you may answer the question.</p>
Page 207	Page 209
<p>1 least since 2008 the County has recognized that</p> <p>2 CAFOs may emit intense odors, vibrations, air</p> <p>3 pollution or other disruptions; is that correct?</p> <p>4 A That's what it says here.</p> <p>5 Q You're a County BZA member, right?</p> <p>6 A Yes.</p> <p>7 Q You were when this Zoning Ordinance was enacted,</p> <p>8 correct?</p> <p>9 A Yes.</p> <p>10 Q You knew that the County intended -- or that its</p> <p>11 view in creating this zone district was to protect</p> <p>12 residential and commercial property owners from</p> <p>13 encroachment of CAFOs or other intensive ag uses</p> <p>14 that are known to emit intense odors and air</p> <p>15 pollution or other disruptions, right?</p> <p>16 MR. BRAUN: And I'll object to the extent</p> <p>17 Exhibit 34 is an incomplete copy of the entire</p> <p>18 Hendricks County Comprehensive Plan from 2008.</p> <p>19 Subject to that, you can answer the question.</p> <p>20 A The question was --</p> <p>21 Q Can you --</p> <p>22 A -- did I --</p> <p>23 Q Go ahead.</p> <p>24 THE WITNESS: Go ahead. Read it back to me</p> <p>25 again.</p>	<p>1 A I stick by my first answer.</p> <p>2 Q Okay. If you look at the one -- Page 1.1 which is</p> <p>3 the first page after the cover.</p> <p>4 A (Witness complies).</p> <p>5 Q Isn't it true that the Ordinance's purpose is to</p> <p>6 promote public health safety, comfort and general</p> <p>7 welfare and to conserve and protect property and</p> <p>8 property values? See that under bullet points 1 and</p> <p>9 2?</p> <p>10 MR. BRAUN: Was your question is that two --</p> <p>11 are those two of the purposes?</p> <p>12 MS. FERRARO: Yes.</p> <p>13 A That's what it says here.</p> <p>14 Q It doesn't say to allow farmers to do what they want</p> <p>15 with their land, does it?</p> <p>16 A I don't -- no.</p> <p>17 Q And then going to the next page, Page 1-3, under</p> <p>18 subsection 1.7 on interpreting the Zoning Ordinance,</p> <p>19 isn't it true that the County intended that the</p> <p>20 provisions of the Zoning Ordinance shall be held to</p> <p>21 the minimum or maximum requirements adopted for the</p> <p>22 promotion of public health safety and general</p> <p>23 welfare, correct?</p> <p>24 A You're on 1-3?</p> <p>25 Q 1.7 and on Page 1-3, yes.</p>

<p style="text-align: right;">Page 210</p> <p>1 A Oh. I don't have a comment for that.</p> <p>2 Q You're a BZA -- member of the BZA, right, Board of</p> <p>3 Zoning Appeals?</p> <p>4 A Yeah.</p> <p>5 Q You were on the BZA when this Ordinance was adopted?</p> <p>6 A Yes.</p> <p>7 Q Presumably you have to be pretty familiar with</p> <p>8 Zoning Ordinances' terms in order to carry out your</p> <p>9 function as a BZA member, correct?</p> <p>10 A Yes.</p> <p>11 Q Okay. Does -- in reading this County has said</p> <p>12 interpret this Ordinance shall, using the word</p> <p>13 mandatory shall, shall be held to the minimum or</p> <p>14 maximum requirements adopted for the promotion of</p> <p>15 the public health safety and general welfare. It</p> <p>16 doesn't say to allow farmers to do what they want</p> <p>17 with their land, does it?</p> <p>18 MR. BRAUN: I'll object to the extent that</p> <p>19 the -- it goes back to the implication that the</p> <p>20 purpose on Page 1.1 that one of the sections omitted</p> <p>21 from the Ordinance's purpose was to secure the most</p> <p>22 adequate and economical provisions for public</p> <p>23 improvement, paying due regard to the Comprehensive</p> <p>24 Plan and any changes made thereto as reflected in</p> <p>25 the Zoning Map and documents and records of</p>	<p style="text-align: right;">Page 212</p> <p>1 MR. BRAUN: Just for the record, I didn't read</p> <p>2 4 but I read 3.</p> <p>3 Q Okay.</p> <p>4 A I don't know on that.</p> <p>5 Q You don't know what it says?</p> <p>6 A What was your question?</p> <p>7 MS. FERRARO: Can you please read my question.</p> <p>8 (Whereupon a portion of the record was read</p> <p>9 back by the court reporter.)</p> <p>10 A I don't know.</p> <p>11 Q Isn't it true that you knew that the property you</p> <p>12 were going to rezone and all of the surrounding</p> <p>13 properties were zoned AGR or agriculture residential</p> <p>14 and before that rural agriculture where CAFOs were</p> <p>15 not permitted?</p> <p>16 A Yes, I knew that.</p> <p>17 Q And you knew that the reason CAFOs were not</p> <p>18 permitted in the AGR district was to protect against</p> <p>19 nuisance claims that arise when -- that arise when</p> <p>20 incompatible land usage such as -- strike that. Let</p> <p>21 me start over.</p> <p>22 You knew that the reason CAFOs were not</p> <p>23 permitted in the AGR districts was to protect</p> <p>24 against nuisance claims that can arise between</p> <p>25 incompatible land uses such as residential</p>
<p style="text-align: right;">Page 211</p> <p>1 Hendricks County for the desirable future</p> <p>2 development of the County, which again is why</p> <p>3 Exhibit 34 is an incomplete -- it's only part of a</p> <p>4 larger Comprehensive Plan and to quote things in</p> <p>5 isolation is misleading. Subject to that, you can</p> <p>6 answer the question.</p> <p>7 MS. FERRARO: And I just want to object on the</p> <p>8 record that counsel is making a speaking objection</p> <p>9 intended to coach the witness. You have an</p> <p>10 opportunity to redirect if you want. This is my</p> <p>11 opportunity to ask questions.</p> <p>12 MR. BRAUN: It was not a speaking objection.</p> <p>13 You read parts of the purpose of the Ordinance and</p> <p>14 you omitted other parts which made it misleading,</p> <p>15 and I'm entitled to state for the record why it was</p> <p>16 misleading.</p> <p>17 Q Okay. Well, let's go through each of the bullet</p> <p>18 points then. If you can turn back to 1-1.</p> <p>19 A (Witness complies).</p> <p>20 Q Do the two other purposes that your counsel just</p> <p>21 read into the record, do they say that the purpose</p> <p>22 of the -- that the purpose of the Ordinance is to</p> <p>23 allow farmers to do what they want with their land?</p> <p>24 A Is that 1.2 Number 3?</p> <p>25 Q Yes, and 4.</p>	<p style="text-align: right;">Page 213</p> <p>1 properties and CAFOs, correct?</p> <p>2 MR. BRAUN: I'm sorry, would you read that</p> <p>3 back, please.</p> <p>4 (Whereupon a portion of the record was read</p> <p>5 back by the court reporter.)</p> <p>6 A No, I knew that -- that CAFOs were permitted use at</p> <p>7 AGI areas and -- which this property is.</p> <p>8 Q That was not my question. My question was you knew</p> <p>9 that the reason CAFOs were not permitted in the AGR</p> <p>10 district was to protect against nuisance claims that</p> <p>11 can arise between incompatible land uses such as</p> <p>12 residential uses and CAFOs or intensive agricultural</p> <p>13 uses?</p> <p>14 MR. BRAUN: Objection; assumes facts not in</p> <p>15 evidence; assumes facts not in evidence. Subject to</p> <p>16 that, you can answer the question.</p> <p>17 A Well, my answer is I knew that my property was in an</p> <p>18 area that was -- an AGI was permitted.</p> <p>19 Q The property was zoned AGR before you rezoned it,</p> <p>20 correct?</p> <p>21 A Correct.</p> <p>22 Q And when it was AGR, CAFOs were not permitted there,</p> <p>23 right?</p> <p>24 A Right.</p> <p>25 Q And before that when it was -- well, actually I</p>

<p style="text-align: right;">Page 226</p> <p>1 A Well, if somebody is going to build a six to -- 6-</p> <p>2 to \$700,000 home in that area, I'd say it's doing</p> <p>3 all right.</p> <p>4 Q That's your opinion?</p> <p>5 A My opinion.</p> <p>6 Q Sure. And the fact that people had actually shown</p> <p>7 up to a hearing, expressed concerns to you and then</p> <p>8 ultimately filed a lawsuit, that's also a</p> <p>9 significant fact, isn't it?</p> <p>10 A That what?</p> <p>11 Q That your CAFO may be impacting some people.</p> <p>12 MR. BRAUN: Object to lack of foundation; but</p> <p>13 subject to that, you can answer the question.</p> <p>14 A I can't really comment on that.</p> <p>15 Q Your neighbors haven't sued you before, have they?</p> <p>16 A No.</p> <p>17 MS. FERRARO: Okay. That's all I have.</p> <p>18 MR. BRAUN: Do you have any questions?</p> <p>19 MS. DAVID: No questions.</p> <p>20 MR. BRAUN: I have no questions. Read and</p> <p>21 sign.</p> <p>22 AND FURTHER DEPONENT SAITH NOT</p> <p>23 (5:38 p.m.)</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 228</p> <p>the event of this action, and am not in the employ of the attorneys for either party.</p> <p>IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this ____ day of _____, 2016.</p> <p style="text-align: center;">_____ Joyce Emerson Notary Public, Stenographic Reporter</p> <p>My County of Residence is: Johnson My Commission Expires: February 20, 2023</p>
<p style="text-align: right;">Page 227</p> <p>STATE OF INDIANA)</p> <p>) SS:</p> <p>COUNTY OF JOHNSON)</p> <p>I, Joyce Emerson, a Notary Public in and for the County of Johnson, State of Indiana at large, do hereby certify that SAMUEL T. HIMSEL, the deponent herein, was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth in the aforementioned matter;</p> <p>That the foregoing deposition was taken on behalf of the Plaintiffs at the law offices of Harrington Law, PC, 105 North Washington Street, Danville, Hendricks County, Indiana, on the 9th day of September 2016, commencing at the hour of 9:04 a.m., pursuant to the Indiana Rules of Trial Procedure;</p> <p>That said deposition was taken down in stenographic notes and afterwards reduced to typewriting under my direction, and that the typewritten transcript is a true record of the testimony given by said deponent; and thereafter presented to said deponent for his signature;</p> <p>That the parties were represented by their aforementioned counsel.</p> <p>I do further certify that I am a disinterested person in this cause of action; that I am not a relative or attorney of either party, or otherwise interested in</p>	

STATE OF INDIANA)
) SS:
COUNTY OF JOHNSON)

I, Joyce Emerson, a Notary Public in and for the County of Johnson, State of Indiana at large, do hereby certify that SAMUEL T. HIMSEL, the deponent herein, was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth in the aforementioned matter;

That the foregoing deposition was taken on behalf of the Plaintiffs at the law offices of Harrington Law, PC, 105 North Washington Street, Danville, Hendricks County, Indiana, on the 9th day of September 2016, commencing at the hour of 9:04 a.m., pursuant to the Indiana Rules of Trial Procedure;

That said deposition was taken down in stenographic notes and afterwards reduced to typewriting under my direction, and that the typewritten transcript is a true record of the testimony given by said deponent; and thereafter presented to said deponent for his signature;

That the parties were represented by their aforementioned counsel.

I do further certify that I am a disinterested person in this cause of action; that I am not a relative or attorney of either party, or otherwise interested in

the event of this action, and am not in the employ of
the attorneys for either party.

IN WITNESS WHEREOF, I have hereunto set my hand and
affixed my notarial seal this 27th day of
September, 2016.



Joyce Emerson
Notary Public, Stenographic Reporter

My County of Residence is: Johnson

My Commission Expires: February 20, 2023

Alliance

Court Reporting

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**CERTIFICATE OF NOTARY AS TO
FAILURE OF WITNESS TO SIGN TRANSCRIPT
WITHIN TIME ALLOWED BY TRIAL RULES**

I hereby certify that JOYCE EMERSON, a Notary Public in and for the County of MARION, State of Indiana, administered an oath at the deposition of SAMUEL T. HIMSEL on the 9TH day of SEPTEMBER, 2016;

That said deposition transcript was made available to the witness for reviewing and signing under the applicable rules of procedure;

That the original transcript was either/or

- ☐ RETURNED UNSIGNED
☐ RETAINED BY THE WITNESS
☒ WITNESS FAILED TO SIGN WITHIN TIME PERIOD ALLOWED UNDER RULES.
☐ OTHER EXPLANATION GIVEN _____

We are therefore filing this original unsigned transcript on this 20TH day of JANUARY, 20 17.


LINDA M. BOUR, NOTARY PUBLIC

County of Residence: MARION
Commission Expires: JUNE 19, 2024

STATE OF INDIANA)
) SS:
COUNTY OF HENDRICKS)

IN THE HENDRICKS COUNTY SUPERIOR COURT

DANVILLE, INDIANA

CAUSE NO. 32D04-1510-PL-150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and SUSAN)
M. LANNON,)
)
 Plaintiffs,)
)
vs.)
)
SAMUEL T. HIMSEL, CORY M. HIMSEL,)
CLINTON S. HIMSEL, 4/9 LIVESTOCK,)
LLC and CO-ALLIANCE, LLP,)
)
 Defendants.)

The deposition upon oral examination of
KEVIN A. STILL, a witness produced and sworn
before me, Linda M. Bour, a Notary Public, in and
for the County of Marion, State of Indiana, taken
on behalf of the Plaintiffs at the offices of
Harrington Law, P.C., 105 North Washington Street,
Danville, Hendricks County, Indiana on October 5,
2016 pursuant to the Applicable Rules of
Procedure.

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<p>1 A. We do not have a policy, but yes, we do support</p> <p>2 our employees attending conferences.</p> <p>3 Q. Will Co-Alliance pay for that?</p> <p>4 A. Yes.</p> <p>5 Q. Those would include -- include meetings of various</p> <p>6 trade organizations like the National Pork</p> <p>7 Producer Council?</p> <p>8 A. Yes.</p> <p>9 Q. And state level organizations like the Indiana</p> <p>10 Pork Producers?</p> <p>11 A. Yes.</p> <p>12 Q. And Co-Alliance has employees within the Swine</p> <p>13 Division and on its Board that are in leadership</p> <p>14 roles with those organizations as well, correct,</p> <p>15 or have been?</p> <p>16 A. So your question is? Just so I'm clear, sorry.</p> <p>17 Q. Yeah. Within Co-Alliance, as a business leader,</p> <p>18 it has employees and Board Members that have or</p> <p>19 currently do hold leadership positions or</p> <p>20 leadership roles within the National Pork</p> <p>21 Producers Council?</p> <p>22 A. Yes.</p> <p>23 Q. And the Indiana Pork Producers Association?</p> <p>24 A. Yes.</p> <p>25 Q. How many contract growers does Co-Alliance have?</p>	<p>1 Q. So essentially that decision-making is largely</p> <p>2 based on demand for finished hogs; is that right?</p> <p>3 A. No.</p> <p>4 Q. How is that incorrect?</p> <p>5 A. That's part of the decision.</p> <p>6 Q. Other than demands, what else?</p> <p>7 A. Well, we think it's really important to help</p> <p>8 promote young farmers coming back to the farm and</p> <p>9 this is a way they can come back and have a steady</p> <p>10 income; we've built feed mills and that's part of</p> <p>11 the equation in the profitability and so we -- we</p> <p>12 take those into consideration, also.</p> <p>13 We also look at what competition is doing</p> <p>14 and we look at what other -- we -- we obviously</p> <p>15 have other producers that we don't own the pigs</p> <p>16 and we work with them, also.</p> <p>17 Q. I'm sorry, I missed that last part. You have</p> <p>18 other producers that?</p> <p>19 A. That we sell feed to.</p> <p>20 Q. That you sell feed to.</p> <p>21 A. But we don't own the pigs.</p> <p>22 Q. I understand.</p> <p>23 A. And when we look at that Division, we look at feed</p> <p>24 and swine because they're interrelated in our --</p> <p>25 in our business.</p>
Page 59	Page 61
<p>1 A. I don't know.</p> <p>2 Q. Do you have a general idea?</p> <p>3 A. A hundred and twenty.</p> <p>4 Q. Before the 4/9 Livestock CAFO was built, which I</p> <p>5 believe was in 2013, do you recall -- I'm talking</p> <p>6 about before that -- generally how many contract</p> <p>7 growers Co-Alliance had?</p> <p>8 A. Eighty.</p> <p>9 Q. Who determines -- maybe we've covered this before,</p> <p>10 but I'm not clear. Who determines the number of</p> <p>11 contract growers that are needed at a particular</p> <p>12 time?</p> <p>13 A. We actually determine that more by the number of</p> <p>14 head than the number of contract growers, and I</p> <p>15 determine that.</p> <p>16 Q. Okay. So tell me what decisions or what factors</p> <p>17 play into decision-making on the number of head</p> <p>18 and that translating into more or less contract</p> <p>19 growers.</p> <p>20 A. Well, I obviously listen to my senior team. We</p> <p>21 look at the industry, we look at the market, we</p> <p>22 look at our over -- overall business vision and</p> <p>23 then we look at the risk in the marketplace and we</p> <p>24 make a determination on how much risk we want to</p> <p>25 take.</p>	<p>1 Q. Sure. So specifically looking at the number of</p> <p>2 contract growers that Co-Alliance has and</p> <p>3 certainly from 2012 where you said there was</p> <p>4 roughly 80 contract growers to now 120, that's</p> <p>5 fairly signif -- well, 40, 40 new contract growers</p> <p>6 in three years, is that considered a large</p> <p>7 increase in number or is that average?</p> <p>8 A. Well, you know, I'm approximating the numbers.</p> <p>9 Q. Sure.</p> <p>10 A. But we have had some good growth and that's over</p> <p>11 four years and it was part of our strategy to</p> <p>12 grow.</p> <p>13 Q. We mentioned -- or you mentioned a few factors</p> <p>14 that go into that decision-making, one being</p> <p>15 demand and one being the desire for Co-Alliance to</p> <p>16 promote young farmers. I'd like to talk about</p> <p>17 that latter factor. What -- what does Co-Alliance</p> <p>18 do to promote young farmers getting into the pork</p> <p>19 production business?</p> <p>20 A. Well I think, number one, we make them aware of</p> <p>21 the opportunity. We have people that are out</p> <p>22 promoting to -- and it's just not young farmers,</p> <p>23 but all farmers, the opportunities to come and</p> <p>24 contract, raise contract pigs, so it's more of a</p> <p>25 probably word-of-mouth.</p>

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<p>1 Q. You would agree that air quality issues, including</p> <p>2 odor, are a concern, an environmental concern</p> <p>3 related to pork production?</p> <p>4 A. No.</p> <p>5 Q. You would not agree with that. Why not?</p> <p>6 A. I don't think there is an environmental concern.</p> <p>7 I think it's odor that could be a little bit of a</p> <p>8 concern.</p> <p>9 Q. Can you explain why you're distinguishing odor</p> <p>10 from air quality?</p> <p>11 A. The way I see it, they're two separate things.</p> <p>12 Q. How so?</p> <p>13 A. You can have -- you can have odor in the air that</p> <p>14 there's not a quality issue, but I'm not a</p> <p>15 scientist.</p> <p>16 Q. What about odor is a concern?</p> <p>17 A. That's your question?</p> <p>18 Q. Uh-huh.</p> <p>19 A. Okay.</p> <p>20 Q. "Yes."</p> <p>21 A. Yes.</p> <p>22 Q. What about odor is a concern to the pork industry,</p> <p>23 to your pork business?</p> <p>24 A. The effect on the neighbors.</p> <p>25 Q. And is the concern -- well, I'll ask directly.</p>	<p>1 perception of pork production topic?</p> <p>2 MS. FERRARO: Yeah.</p> <p>3 MR. BRAUN: All right. Sorry.</p> <p>4 A. Through public relations, through public</p> <p>5 perception.</p> <p>6 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>7 Q. And how is per -- how would the public come</p> <p>8 aware -- become aware of these issues? What --</p> <p>9 what specifically about public awareness or public</p> <p>10 perception are you talking about there?</p> <p>11 Let's just break it down. So you're</p> <p>12 aware that there have been lawsuits all around the</p> <p>13 country that have arisen because of odor and air</p> <p>14 issues related to CAFOs, correct?</p> <p>15 A. Yes.</p> <p>16 Q. Would that be one of the ways that there might be</p> <p>17 adverse public perception as a result of the odor</p> <p>18 issues related to hog production?</p> <p>19 A. Yes.</p> <p>20 Q. Now that we're sort of on the same page, is there</p> <p>21 anything else?</p> <p>22 A. Just, you know, public -- public relations, public</p> <p>23 awareness, (negative nod).</p> <p>24 Q. Mr. Still, can you describe -- I'm shifting gears.</p> <p>25 What are the basic components of a hog CAFO?</p>
Page 91	Page 93
<p>1 How is that translated as concern for neighbors,</p> <p>2 how is that translated into a business concern for</p> <p>3 the pork industry itself?</p> <p>4 A. Well again, we've got I-D-E-M regulations and</p> <p>5 State regulations that we have to comply with.</p> <p>6 Q. Uh-huh.</p> <p>7 A. Plus local zoning ordinances and comprehensive</p> <p>8 plans, so we -- we just comply with those. And I</p> <p>9 think the industry understands that we -- we have</p> <p>10 those parameters to live within, and we do.</p> <p>11 Q. Sure. My question was, you mentioned that odor</p> <p>12 would -- odor is a concern to the industry because</p> <p>13 of the potential impact on neighbors if that's how</p> <p>14 that comes into play as a concern, correct?</p> <p>15 A. Yes.</p> <p>16 Q. Yeah. And so how does that manifest itself as a</p> <p>17 bottom line issue for the pork industry?</p> <p>18 A. I'm not sure I understand your question.</p> <p>19 Q. So are there -- is it litigation costs that have</p> <p>20 resulted because of odor concerns? What is it</p> <p>21 specifically about odor impact on neighbors that</p> <p>22 has given rise to this being a concern for the</p> <p>23 pork industry itself?</p> <p>24 MR. BRAUN: Ask for clarification. Are</p> <p>25 you still within the consumer demands of public</p>	<p>1 A. Well, I only know at an extremely high level</p> <p>2 because I rely on my people to know that</p> <p>3 information, so I know it's a confined feeding</p> <p>4 operation that meets IDEM requirements and the</p> <p>5 State of Indiana regulations.</p> <p>6 Q. I understand that that's a concern for</p> <p>7 Co-Alliance, that its CAFOs meet IDEM regulations.</p> <p>8 My question is pretty basic. What are the -- what</p> <p>9 is a CAFO? What -- what makes up a CAFO? There</p> <p>10 are buildings, correct --</p> <p>11 A. Yes.</p> <p>12 Q. -- that confine the hogs, right?</p> <p>13 A. Yes.</p> <p>14 Q. There are waste pits or outdoor lagoons --</p> <p>15 A. Yes.</p> <p>16 Q. -- that collect the waste produced by the hogs,</p> <p>17 right?</p> <p>18 A. Yes.</p> <p>19 Q. Typically there is some sort of ventilation system</p> <p>20 so that the hogs can breathe, correct?</p> <p>21 A. Yes.</p> <p>22 Q. And then we know that there has to be land to</p> <p>23 apply the manure that's produced by the hogs,</p> <p>24 right?</p> <p>25 A. Yes.</p>

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<p>1 Q. That's what I'm getting at. What else? Those are</p> <p>2 sort of the basic components of a CAFO. What</p> <p>3 else?</p> <p>4 A. That's -- that's about what I know about it.</p> <p>5 Q. You're also somewhat familiar with IDEM's</p> <p>6 regulations, correct?</p> <p>7 A. Somewhat, very high level.</p> <p>8 Q. You know that to be a CAFO, in order to be</p> <p>9 regulated by the IDEM regulations, that a</p> <p>10 confinement facility has to head a certain number</p> <p>11 of animals, has to confine a certain number?</p> <p>12 A. Right.</p> <p>13 Q. And for hogs is it your understanding that it has</p> <p>14 to confine more than 2,500 hogs over 55 pounds in</p> <p>15 order to meet that regulatory definition?</p> <p>16 A. Yes.</p> <p>17 Q. So that would be another component of being a</p> <p>18 CAFO?</p> <p>19 A. Yes.</p> <p>20 Q. The 4/9 CAFO confines 8,000 hogs, correct, at any</p> <p>21 one time?</p> <p>22 A. I believe two buildings, 4,000 pigs each.</p> <p>23 Q. So 8,000?</p> <p>24 A. Yes.</p> <p>25 Q. And the waste produced by the hogs at the 4/9 CAFO</p>	<p>1 Q. You don't know? Do you -- do you agree with me</p> <p>2 that the ventilation fans are there to keep air</p> <p>3 quality inside the buildings good for the pigs,</p> <p>4 right?</p> <p>5 A. Yes.</p> <p>6 Q. So presumably you can't keep the odorous compounds</p> <p>7 produced by the waste inside because it would harm</p> <p>8 the pigs, right?</p> <p>9 A. Yes.</p> <p>10 Q. So the ventilation fans are blowing those odor</p> <p>11 emissions outdoors, correct?</p> <p>12 A. Yes.</p> <p>13 MS. FERRARO: Chris, I'm going to take</p> <p>14 one more, just a couple-minute break.</p> <p>15 MR. BRAUN: Sure.</p> <p>16 (A brief recess was taken and a</p> <p>17 discussion was held off the record;</p> <p>18 the proceedings continue without</p> <p>19 Mr. Ehrie, per his request.)</p> <p>20 DIRECT EXAMINATION (CONTINUING),</p> <p>21 QUESTIONS BY MS. KIM E. FERRARO:</p> <p>22 Q. Going back to the period of time where the</p> <p>23 decision was made to enter into the Hog Production</p> <p>24 Contract with 4/9, isn't it true that it was also</p> <p>25 common knowledge within the pork industry that the</p>
Page 95	Page 97
<p>1 is collected into concrete pits underneath?</p> <p>2 A. Yes.</p> <p>3 Q. At the time the decision was made by Co-Alliance</p> <p>4 to enter into the Hog Production Contract with</p> <p>5 4/9, it was common knowledge that hogs produce</p> <p>6 waste, correct?</p> <p>7 A. Yes.</p> <p>8 Q. Urine and feces specifically, right?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And at the time the decision was made to</p> <p>11 construct the 4/9 CAFO, it was common knowledge</p> <p>12 within the pork industry that hog waste produced</p> <p>13 certain odorous compounds, right?</p> <p>14 A. Yes.</p> <p>15 Q. And that those odorous compounds can be offensive</p> <p>16 to smell for people, correct?</p> <p>17 A. Yes.</p> <p>18 Q. So at the time the decision was made to construct</p> <p>19 the -- to enter into the Hog Production Contract</p> <p>20 to construct the 4/9 CAFO, it was common</p> <p>21 industry -- pork industry knowledge that the</p> <p>22 ventilation fans at a CAFO blow any emissions, the</p> <p>23 odorous compound from the waste into the outside,</p> <p>24 correct?</p> <p>25 A. I don't know.</p>	<p>1 odorous emissions that we talked about from hog</p> <p>2 waste include hydrogen sulfite and ammonia?</p> <p>3 A. I don't know if that's common knowledge.</p> <p>4 Q. Within Co-Alliance's Swine Division, is it common</p> <p>5 knowledge?</p> <p>6 A. I don't know.</p> <p>7 Q. Have you ever heard that before?</p> <p>8 A. Yes.</p> <p>9 Q. Where have you heard that?</p> <p>10 A. From Dewey Bucher.</p> <p>11 Q. And in find -- in fact in 2005 Northwind -- and I</p> <p>12 know this was prior to your time, but presumably</p> <p>13 you're aware of it, that Northwind Pork signed</p> <p>14 onto the EPA Air Consent Agreement, correct?</p> <p>15 A. I don't know that.</p> <p>16 Q. You don't know that?</p> <p>17 A. No.</p> <p>18 Q. You were not made aware of the agreement that</p> <p>19 Northwind has with EPA -- excuse me -- along with</p> <p>20 other hog CAFOs and other CAFOs to resolve</p> <p>21 potential past violations of the Clean Air Act and</p> <p>22 the Emergency Planning and Community Right to Know</p> <p>23 Act, you're not aware of that?</p> <p>24 A. I was made aware after 2005, but I wasn't made</p> <p>25 aware of it in 2005.</p>

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<p>1 Q. Oh, I understand. But you became aware of that?</p> <p>2 A. Yes.</p> <p>3 Q. How did you become aware of that?</p> <p>4 A. Dewey Bucher told me.</p> <p>5 Q. So as part of that, you understand that there is a</p> <p>6 regulatory concern for emissions of hydrogen</p> <p>7 sulfite and ammonia from hog CAFOs, correct?</p> <p>8 A. Yes.</p> <p>9 Q. Are you aware that the National Pork Board has</p> <p>10 developed Best Management Practices for</p> <p>11 controlling odors and air emissions including</p> <p>12 hydrogen sulfite and ammonia from hog CAFOs?</p> <p>13 A. Yes.</p> <p>14 Q. When did you become aware of that?</p> <p>15 A. Probably in 2006.</p> <p>16 Q. At the time that the decision was made to</p> <p>17 construct the 4/9 CAFO, is it true that it was</p> <p>18 common knowledge within the pork industry that</p> <p>19 many nuisance lawsuits have been brought over the</p> <p>20 preceding decades against hog CAFO owner/operators</p> <p>21 around the country, including in Indiana, by</p> <p>22 neighbors who allege their ability to live</p> <p>23 comfortably in their homes have been ever so</p> <p>24 impacted from the noxious odors and air emissions</p> <p>25 emitted from nearby hog CAFOs?</p>	<p>1 sort of Right to Farm Laws on the books that</p> <p>2 provide protection to hog CAFO owner/operators</p> <p>3 against nuisance lawsuits?</p> <p>4 MR. BRAUN: Objection. Calls for a legal</p> <p>5 conclusion.</p> <p>6 Subject to that, you may answer the</p> <p>7 question.</p> <p>8 A. Yes.</p> <p>9 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>10 Q. And Indiana has a Right to Farm Act, you're aware</p> <p>11 of that?</p> <p>12 A. Yes.</p> <p>13 Q. The Swine Division employees of Co-Alliance are</p> <p>14 aware of that?</p> <p>15 A. Yes.</p> <p>16 Q. What's your understanding -- I understand you're</p> <p>17 not a lawyer. What is your understanding of the</p> <p>18 protection that the Right to Farm Act provides?</p> <p>19 A. It's to protect farmers from nuisances.</p> <p>20 Q. It's to protect farmers from nuisances? What sort</p> <p>21 of nuisances would farmers be subjected to?</p> <p>22 A. Well, there's three -- I think there's three basic</p> <p>23 bullet points there. Number one, the land has --</p> <p>24 has to be used for that agricultural purpose, for</p> <p>25 that work, for a year. There can't be</p>
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<p>1 (Mr. Ehrie returns to the proceedings.)</p> <p>2 MR. BRAUN: Objection. Question calls</p> <p>3 for speculation as to whether it's common</p> <p>4 knowledge within the industry and what was -- and</p> <p>5 what was contained in the alleged lawsuits which</p> <p>6 there has been no foundation laid.</p> <p>7 Subject to that, you may answer the</p> <p>8 question.</p> <p>9 A. I believe your question was: Was I aware of that?</p> <p>10 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>11 Q. Actually it was my -- my question was whether or</p> <p>12 not it was common knowledge within the pork</p> <p>13 industry itself, but -- so I'd like an answer to</p> <p>14 that question first.</p> <p>15 A. I don't know if it was common knowledge, but yes,</p> <p>16 it was out there.</p> <p>17 Q. Certainly you were aware of that?</p> <p>18 A. Yes.</p> <p>19 Q. Your staff and employees at the Co-Alliance Swine</p> <p>20 Division were aware of that?</p> <p>21 A. Yes.</p> <p>22 Q. At the time the decision was made to enter into</p> <p>23 the Hog Production Contract with 4/9, was</p> <p>24 Co-Alliance's Swine Division staff -- and you</p> <p>25 specifically -- aware that all 50 states had some</p>	<p>1 significant -- significant change, and significant</p> <p>2 change going from land to hog barn is not</p> <p>3 significant change. And third, it couldn't -- it</p> <p>4 could not be a nuisance when it came in.</p> <p>5 Q. So when you're talking about protecting farmers</p> <p>6 from nuisances, you're saying that protection from</p> <p>7 nuisance suits, is that what, nuisance lawsuits?</p> <p>8 What is your -- what is your understanding of --</p> <p>9 what do you mean by nuisances then?</p> <p>10 A. From complaints, lawsuits from neighbors.</p> <p>11 Q. With respect to your understanding of the Right to</p> <p>12 Farm Act and the alleged nuisance -- or the</p> <p>13 nuisance protection that it provides to farmers,</p> <p>14 would those nuisances be --</p> <p>15 MS. FERRARO: Strike that. I have to</p> <p>16 think about it before I ask you this question.</p> <p>17 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>18 Q. What is your -- what is your understanding of the</p> <p>19 nuisance protection itself? What -- what -- what</p> <p>20 is a nuisance? What would be the basis of a</p> <p>21 nuisance suit to your understanding?</p> <p>22 MR. BRAUN: I'll object only to the</p> <p>23 extent that it calls for a legal conclusion and it</p> <p>24 calls for speculation.</p> <p>25 Subject to that, you may answer the</p>

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<p>1 Subject to that, you may answer the</p> <p>2 question.</p> <p>3 A. We do not choose the site. The owner/operators</p> <p>4 choose the site, apply for I-D -- I-D-E-M permits,</p> <p>5 hires the contractor, builds the building,</p> <p>6 finances the building, so we make no choice in the</p> <p>7 site selection.</p> <p>8 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>9 Q. Yes, I understand. My question was: Isn't it</p> <p>10 accurate to say that the Co-Alliance contracts</p> <p>11 with its growers, including 4/9 in this instance,</p> <p>12 contains no requirement that their CAFOs not</p> <p>13 impose a nuisance on their neighbors?</p> <p>14 MR. BRAUN: Objection. Calls for a legal</p> <p>15 conclusion in the application of the Hog Finishing</p> <p>16 Contract and provisions of what it does or does</p> <p>17 not provide relative to compliance with the law or</p> <p>18 the nuisance allegations.</p> <p>19 Subject to that, you can answer the</p> <p>20 question.</p> <p>21 A. The contract speaks for itself.</p> <p>22 (A brief clarification was made</p> <p>23 in the record at the request of</p> <p>24 the Court Reporter.)</p> <p>25 MS. FERRARO: I'm sorry, I didn't hear</p>	<p>1 A_F_T_E_R_N_O_O_N S_E_S_S_I_O_N</p> <p>2</p> <p>3 MS. FERRARO: Hope you enjoyed the</p> <p>4 Mayberry lunch.</p> <p>5 THE WITNESS: It was great.</p> <p>6 DIRECT EXAMINATION (CONTINUING),</p> <p>7 QUESTIONS BY MS. KIM E. FERRARO:</p> <p>8 Q. Okay, I'm going to have you take a look back at</p> <p>9 Exhibit 16.</p> <p>10 A. (Witness complies).</p> <p>11 Q. This -- excuse me, can you tell us what this</p> <p>12 document is?</p> <p>13 A. It's a letter in support of the Himsels' request</p> <p>14 for a zoning change.</p> <p>15 Q. And was submitted on February 5th, 2013 to the</p> <p>16 Hendricks County Plan Commission, correct?</p> <p>17 A. Yes.</p> <p>18 Q. In support of Sam Himsels' request for a zoning</p> <p>19 change, and you signed this on behalf of</p> <p>20 Co-Alliance, correct?</p> <p>21 A. Yes.</p> <p>22 Q. What was your understanding of the -- of the</p> <p>23 zoning request?</p> <p>24 A. I believe it was getting it zoned to AGI, rezoned</p> <p>25 to AGI.</p>
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<p>1 your answer.</p> <p>2 THE WITNESS: Could you restate -- I'm</p> <p>3 sorry, could you restate the question?</p> <p>4 MS. FERRARO: Oh, boy.</p> <p>5 THE WITNESS: I apologize.</p> <p>6 MS. FERRARO: So I'm going to have you</p> <p>7 restate my question.</p> <p>8 MR. BRAUN: I apologize.</p> <p>9 MS. FERRARO: No, that's all right.</p> <p>10 MR. BRAUN: I'm sorry. It gets -- it</p> <p>11 gets confusing especially with the objections --</p> <p>12 MS. FERRARO: Yeah.</p> <p>13 MR. BRAUN: -- which can be a distraction</p> <p>14 as well. Not that my objections aren't a</p> <p>15 distraction, but they are a distraction to the</p> <p>16 witness.</p> <p>17 (A portion of the record was read</p> <p>18 back by the Court Reporter.)</p> <p>19 A. The contract speaks for itself and that is not</p> <p>20 included in the contract.</p> <p>21 MS. FERRARO: And I think we are at a</p> <p>22 great point to have a quick lunch, okay?</p> <p>23 MR. BRAUN: All right.</p> <p>24</p> <p>25 (A brief lunch recess was taken.)</p>	<p>1 Q. In fact, you referenced that in the first</p> <p>2 paragraph of your letter that you're supporting</p> <p>3 the zoning change for land, the identified</p> <p>4 property parcel, from Agricultural --</p> <p>5 Agricultural-Residential to</p> <p>6 Agricultural-Intensive. Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. How did you know the details of the zoning</p> <p>9 request?</p> <p>10 A. I -- I just knew the basics of what</p> <p>11 Agricultural-Residential was and what AGI was.</p> <p>12 Q. Okay. But specifically it appears that the parcel</p> <p>13 on which the 4/9 CAFO is now built is referenced</p> <p>14 in your letter, correct?</p> <p>15 A. Yes.</p> <p>16 Q. And my question is: How were you -- how did you</p> <p>17 know the specific information about the parcel and</p> <p>18 the zoning request?</p> <p>19 A. Dewey Bucher or Legal Counsel got me that</p> <p>20 information.</p> <p>21 Q. What was your understanding of the implications of</p> <p>22 the zoning request? I understand you're not a</p> <p>23 lawyer, but just your general understanding of</p> <p>24 what was -- what that meant, to change from AGR to</p> <p>25 AGI.</p>

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<p>1 MR. BRAUN: I'll object again just to the</p> <p>2 extent it calls for a legal conclusion or an</p> <p>3 interpretation of a zoning classification under</p> <p>4 Hendricks County Zoning Laws.</p> <p>5 But subject to that, you can answer the</p> <p>6 question.</p> <p>7 A. I -- I don't know.</p> <p>8 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>9 Q. Do you know what a -- what an AGR-zoned district</p> <p>10 is?</p> <p>11 A. No.</p> <p>12 Q. Do you know what an AGI-zoned district is?</p> <p>13 A. Just basically, you know, you can have intense</p> <p>14 agriculture on there, farming or animal.</p> <p>15 Q. Are you -- are you aware that the Hendricks County</p> <p>16 Zoning Ordinance recognizes that CAFOs can create</p> <p>17 intense odors, which is the intent for creating</p> <p>18 the Agricultural-Intense District?</p> <p>19 A. No.</p> <p>20 Q. I believe you said earlier you wrote this letter</p> <p>21 because Dewey Bucher asked you to --</p> <p>22 A. Yes.</p> <p>23 Q. -- correct? And it was his understanding that</p> <p>24 there was some neighbor opposition to this zoning</p> <p>25 request, correct?</p>	<p>1 A. Yes.</p> <p>2 Q. So if that information was wrong, you would be</p> <p>3 providing incorrect assurance to the Plan</p> <p>4 Commission about potential impact basic -- based</p> <p>5 upon proximity of neighbors?</p> <p>6 A. Yes. They obviously are the Zoning Commission;</p> <p>7 they know the county better than I do.</p> <p>8 Q. Sure. But you're writing a letter on behalf of a</p> <p>9 zoning request and you're the CEO of a major</p> <p>10 agribusiness company in Indiana in Hendricks</p> <p>11 County.</p> <p>12 A. Correct.</p> <p>13 Q. Correct?</p> <p>14 A. Yes.</p> <p>15 Q. So what you say carries a lot of weight, right?</p> <p>16 A. I don't know.</p> <p>17 Q. That's why you were asked to write this letter,</p> <p>18 correct?</p> <p>19 A. I don't know.</p> <p>20 Q. And you attended the Zoning Hearing on March 12th,</p> <p>21 2013, right?</p> <p>22 A. Yes.</p> <p>23 Q. And you spoke actually in favor of the hearing --</p> <p>24 A. Yes.</p> <p>25 Q. -- I'm sorry -- of the rezoning request?</p>
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<p>1 A. Yes.</p> <p>2 Q. You mention in the -- in the letter, it looks like</p> <p>3 the second paragraph down, that the nearest</p> <p>4 neighbor is Cory Himself and that the next nearest</p> <p>5 neighbor is approximately half a mile away. Do</p> <p>6 you see that?</p> <p>7 A. Yes.</p> <p>8 Q. How did you verify that information?</p> <p>9 A. I just was somewhat familiar with the</p> <p>10 neighborhood; that's why I used the term</p> <p>11 "approximately".</p> <p>12 Q. You're aware that there are actually several</p> <p>13 neighbors that are within a closer distance than a</p> <p>14 half mile of the 4/9 CAFO property, correct?</p> <p>15 A. I don't know that.</p> <p>16 Q. You attended the Zoning Hearing?</p> <p>17 A. Yes.</p> <p>18 Q. Actually let me back up. Why was it important for</p> <p>19 you to talk about who the next nearest neighbor is</p> <p>20 in this matter?</p> <p>21 A. Just to talk about that it's -- you know, it's a</p> <p>22 rural area and it's one that would fit in AGI.</p> <p>23 Q. Was that a way to dispel concerns for neighbor</p> <p>24 impact by talking about how close the neighbors</p> <p>25 are to this proposed site?</p>	<p>1 A. Yes.</p> <p>2 Q. Were you present for the entire Zoning Hearing?</p> <p>3 A. Could you clarify?</p> <p>4 Q. For the portion of the rezoning request of Sam</p> <p>5 Himself, were you present for that entire hearing?</p> <p>6 A. Yes.</p> <p>7 Q. You heard various remonstrators speak, correct?</p> <p>8 A. Yes.</p> <p>9 Q. You heard neighbors express concerns at that</p> <p>10 hearing about this proposed CAFO, correct?</p> <p>11 A. Yes.</p> <p>12 Q. In fact we can pull out the transcript, but I'll</p> <p>13 represent to you that 12 spoke in opposition to</p> <p>14 the proposed CAFO and five spoke in support. Is</p> <p>15 that consistent with your recollection?</p> <p>16 A. Yes.</p> <p>17 Q. And the 12 that were opposed raised concerns of</p> <p>18 potential noxious odors coming on to their</p> <p>19 properties. Do you remember hearing them raise</p> <p>20 that concern?</p> <p>21 A. Yes.</p> <p>22 Q. Do you recall that they were concerned about</p> <p>23 unregulated air emissions potentially coming onto</p> <p>24 their properties, do you recall that?</p> <p>25 A. Not specifically.</p>

<p style="text-align: right;">Page 130</p> <p>1 I misheard.</p> <p>2 MS. FERRARO: Yeah, I misspoke, my</p> <p>3 apologies.</p> <p>4 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>5 Q. You would agree that 4/9 would not have built the</p> <p>6 CAFO but for the 4/9 contract that it has with</p> <p>7 Co-Alliance?</p> <p>8 A. I don't know that.</p> <p>9 Q. Is there any other company that 4/9 was going to</p> <p>10 raise hogs for?</p> <p>11 A. I don't know that.</p> <p>12 Q. Would it be fair to say that as we discussed</p> <p>13 before that you knew that the Right to Farm Act</p> <p>14 would provide protection to 4/9 from nuisance</p> <p>15 suits brought by neighbors for issues regarding</p> <p>16 odors and air emissions and reduced property</p> <p>17 values?</p> <p>18 MR. BRAUN: Objection. Calls for a legal</p> <p>19 interpretation of an Indiana statute and the</p> <p>20 application of a statute as it relates to the</p> <p>21 ultimate issues before the Court in this case.</p> <p>22 But subject to that, you can answer the</p> <p>23 question.</p> <p>24 THE WITNESS: I need to probably be a</p> <p>25 little clearer. Could you restate?</p>	<p style="text-align: right;">Page 132</p> <p>1 interpretation of Indiana statute, assumes facts</p> <p>2 not in evidence, lack of foundation as to the</p> <p>3 legal issues ultimately before the Court in this</p> <p>4 case.</p> <p>5 Subject to that, you can answer the</p> <p>6 question.</p> <p>7 A. Can you restate? I apologize.</p> <p>8 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>9 Q. That's okay.</p> <p>10 MS. FERRARO: Actually can you read the</p> <p>11 question back?</p> <p>12 (A portion of the record was read</p> <p>13 back by the Court Reporter.)</p> <p>14 MR. BRAUN: I'll further amend my</p> <p>15 objection. Calls for speculation and it also</p> <p>16 would call into question the interpretation of the</p> <p>17 Hog Finishing Contract as a legal document as to</p> <p>18 what it may or may not provide.</p> <p>19 Subject to that, you may answer the</p> <p>20 question.</p> <p>21 A. I don't know.</p> <p>22 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>23 Q. Look at your letter that you submitted to the</p> <p>24 Hendricks County Plan Commission. You indicated</p> <p>25 that Co-Alliance and Sam would be partners. Do</p>
<p style="text-align: right;">Page 131</p> <p>1 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>2 Q. Is one of the reasons that you didn't do anything</p> <p>3 to address the neighbors' concerns is because you</p> <p>4 knew that the Right to Farm Act would provide</p> <p>5 protection to 4/9 from any nuisance claims that</p> <p>6 they might bring?</p> <p>7 MR. BRAUN: Same objection.</p> <p>8 A. It's a confusing question to me. The answer is,</p> <p>9 you know, no, we didn't let -- we didn't agree for</p> <p>10 Himsels to build their site because it was going</p> <p>11 to be protected by the Indiana Right to Farm Law;</p> <p>12 that wasn't one of the reasons. And again, we</p> <p>13 don't choose the site.</p> <p>14 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>15 Q. You supported this particular CAFO at this site,</p> <p>16 correct?</p> <p>17 A. Yes.</p> <p>18 Q. You didn't do anything to -- as we talked about</p> <p>19 before -- to determine whether or not it was an</p> <p>20 appropriate site, correct?</p> <p>21 A. That's not for us to determine.</p> <p>22 Q. And you knew that Co-Alliance wouldn't have any</p> <p>23 liability anyway for any such nuisance claims,</p> <p>24 correct?</p> <p>25 MR. BRAUN: Objection. Calls for an</p>	<p style="text-align: right;">Page 133</p> <p>1 you see that?</p> <p>2 A. Can you tell me which paragraph?</p> <p>3 Q. Yeah. I have to find it now. Well I'm not</p> <p>4 finding it. You know what? I confused my</p> <p>5 exhibits. It was something that you said in your</p> <p>6 testimony. That's all right, we'll -- we'll skip</p> <p>7 it.</p> <p>8 Do you recall representing to the Zoning</p> <p>9 Board that Co-Alliance would be partners with Sam</p> <p>10 Himsel in this endeavor?</p> <p>11 A. Yes.</p> <p>12 Q. That you understand that partners, the term</p> <p>13 partner actually has legal implications?</p> <p>14 A. I -- I believe the -- the intended use in this</p> <p>15 situation was that we were going to be working</p> <p>16 together, we were not --</p> <p>17 Q. Not in any sort of legal partnership?</p> <p>18 A. We were not going to be legal partners.</p> <p>19 Q. If you could go back to Exhibit 1.</p> <p>20 A. (Witness complies).</p> <p>21 Q. Are you there?</p> <p>22 A. Yeah.</p> <p>23 Q. Okay. So on Page 1 under the WHEREAS clauses. By</p> <p>24 the way, Exhibit 1 is the Co-Alliance Hog</p> <p>25 Finishing Contract that Co-Alliance has with 4/9,</p>

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<p>1 A. I'm not sure I understand the question on 2 "customers". 3 QUESTIONS CONTINUING BY MS. FERRARO: 4 Q. Well, are you aware of any other hogs being raised 5 other than Co-Alliance's by the 4/9 CAFO? 6 A. No. 7 Q. And under the provision that we just read there -- 8 excuse me -- 4/9 is prevented from raising pigs 9 from another source without getting Co-Alliance's 10 consent, right? 11 A. Per the contract and for bio-security purposes, 12 that's correct. 13 Q. Okay. So my question was: 4/9 Livestock, even 14 though it's a 4/9 CAFO and it's their business, 15 Co-Alliance restricts per this contract who its 16 customers can be? 17 A. (No response). 18 Q. When I'm talking about "customers", 4/9 is in the 19 business of raising Co-Alliance's hogs, right? 20 A. Correct. 21 Q. That's its sole purpose essentially, right? 22 MR. BRAUN: Can you state -- when you say 23 "its", Kim, are you referring to 4/9's customers? 24 MS. FERRARO: Yeah, uh-huh. 25 MR. BRAUN: All right.</p>	<p>1 And then go down a little ways towards 2 the end, it says that: "The Grower" -- excuse 3 me -- "agrees to abide by the Owner's Recommended 4 Management Practices, which are attached hereto as 5 Exhibit A", do you see that? 6 A. Yes. 7 Q. So even though these are Recommended Management 8 Practices, under this term they're actually -- 9 actually required practices, right? 10 MR. BRAUN: Objection. Calls for 11 interpretation of a legal document which speaks 12 for itself and an interpretation which is an issue 13 for the Court to decide. 14 Subject to that, you can answer the 15 question. 16 A. Per the agreement, yes. 17 QUESTIONS CONTINUING BY MS. FERRARO: 18 Q. And going down to Section 2.14, which we've 19 already talked to on Liability, this -- this 20 provision requires 4/9 to carry liability 21 insurance for Co-Alliance's hogs, right? 22 A. Yes. 23 Q. Which we know 4/9 has done and named Northwind as 24 the insured, right? 25 A. Yes.</p>
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<p>1 THE WITNESS: I'm -- I'm confused. Can 2 you restate it? 3 MS. FERRARO: Sure. 4 QUESTIONS CONTINUING BY MS. FERRARO: 5 Q. The purpose of 4/9 Livestock, LLC as a business 6 entity is to raise hogs for Co-Alliance, right? 7 A. Correct. 8 Q. And per this contract, they can't raise hogs from 9 another source without getting Co-Alliance's 10 consent, right? 11 A. Correct. 12 Q. So the question is even though 4/9 is its own 13 business, the Co-Alliance contract restricts who 14 it can raise hogs for? 15 A. Correct. 16 Q. Now if you go to Section 2.10, which is on the 17 next page under Standards of Care -- 18 A. (Witness complies). 19 Q. -- at the top it says "The Grower shall" -- top of 20 this paragraph -- "The Grower shall provide care 21 for the pigs in a good workmanship-like, 22 professional manner, and all actions of the Grower 23 shall be taken in accordance with any rules, 24 procedures, or policies as may be reasonably 25 provided by the Owner."</p>	<p>1 Q. Also going further in Section 2.14, and it's on 2 the top of that next page towards the top, midway 3 down, it says: The Grower shall hold the Owner 4 harmless from any liability which may arise on the 5 said premises to a third-party. It is hereby 6 acknowledged that since the Grower owns the 7 facilities in which the pigs are to be grown 8 (including the feed bins and the property around 9 such facilities) that it is the Grower's 10 responsibility to insure for damages, including 11 but not limited to damages to a third -- third 12 parties. Do you see is that? 13 A. Yes. 14 Q. Under the terms of this contract, is 4/9 15 indemnifying Co-Alliance for Plaintiffs' alleged 16 damages in this case? 17 MR. BRAUN: Objection. Ultimately calls 18 for the interpretation of a legal document. The 19 document speaks for itself. The terms 20 "indemnity", "indemnification" are terms of art 21 with legal consequences associated with those that 22 are more appropriately decided by the Court. 23 Subject to that, you can answer the 24 question. 25 A. I don't know.</p>

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<p>1 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>2 Q. You understand that the Plaintiffs in this case</p> <p>3 contend that the odors and harmful air emissions</p> <p>4 from the waste produced by Co-Alliance's hogs is</p> <p>5 what's causing them harm, right? You understand</p> <p>6 that?</p> <p>7 MS. FERRARO: And I used the word</p> <p>8 "contend".</p> <p>9 MR. BRAUN: Yeah. And I'll object to the</p> <p>10 extent it's -- the question is inconsistent with</p> <p>11 the allegations of the parties.</p> <p>12 Subject to that, you can answer the</p> <p>13 question.</p> <p>14 A. I think "harm" is a general term, so I'm going to</p> <p>15 say I don't know.</p> <p>16 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>17 Q. I'll rephrase it. You understand that Plaintiffs</p> <p>18 are alleging in this case that odors and air --</p> <p>19 harmful air emissions from the 4/9 CAFO by</p> <p>20 Co-Alliance's hogs, produced by Co-Alliance's</p> <p>21 hogs, is what is causing the nuisance conditions</p> <p>22 that they're living with, is that your</p> <p>23 understanding?</p> <p>24 A. Yes.</p> <p>25 Q. You would agree that 4/9's empty buildings do not</p>	<p>1 A. Yes.</p> <p>2 Q. You would agree that without Co-Alliance's hogs,</p> <p>3 no odors or air emissions from hog waste could be</p> <p>4 emitted from 4/9's property?</p> <p>5 MR. BRAUN: Same objections.</p> <p>6 Subject to that, you may answer the</p> <p>7 question.</p> <p>8 A. Yes.</p> <p>9 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>10 Q. So you would agree then that 4/9 is having to hold</p> <p>11 harmless -- hold Co-Alliance harmless -- or</p> <p>12 indemnify Co-Alliance for alleged harm that 4/9's</p> <p>13 buildings and property could not possibly cause</p> <p>14 without Co-Alliance's hogs?</p> <p>15 MR. BRAUN: Objection. Assumes facts not</p> <p>16 in evidence. The terms "indemnity" and</p> <p>17 "indemnification" are legal terms of art with</p> <p>18 legal significance, ultimate questions for the</p> <p>19 Court to decide the interpretation and obligation</p> <p>20 of this contract. There's too many facts set</p> <p>21 forth in this case.</p> <p>22 But subject to that, you can answer the</p> <p>23 question.</p> <p>24 A. I don't know.</p> <p>25 QUESTIONS CONTINUING BY MS. FERRARO:</p>
Page 155	Page 157
<p>1 by themselves produce hog waste?</p> <p>2 A. Yes.</p> <p>3 Q. That would be really weird. And 4/9's empty</p> <p>4 buildings do not by themselves emit odors and air</p> <p>5 emissions, right?</p> <p>6 A. Yes.</p> <p>7 Q. And that 4/9's livestock, feed bins, and property</p> <p>8 around the buildings do not by themselves produce</p> <p>9 hog waste or odors from hog waste, correct?</p> <p>10 A. Yes.</p> <p>11 Q. You would agree that without Co-Alliance's hogs,</p> <p>12 there would be no hog waste produced on the</p> <p>13 4/9 property?</p> <p>14 MR. BRAUN: Objection. Assumes facts not</p> <p>15 in evidence. Lack of foundation.</p> <p>16 Subject to that, you can answer the</p> <p>17 question.</p> <p>18 A. Can you restate it?</p> <p>19 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>20 Q. Sure. Without Co-Alliance's hogs present, there</p> <p>21 would be no hog waste produced on the</p> <p>22 4/9 property?</p> <p>23 A. Unless other hogs were there.</p> <p>24 Q. Sure. Under the terms of the existing contract</p> <p>25 that governs 4/9's livestock operations?</p>	<p>1 Q. You would agree that 4/9 Livestock has to operate</p> <p>2 the CAFO --</p> <p>3 MS. FERRARO: Strike that.</p> <p>4 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>5 Q. 4/9 Livestock has to operate the CAFO and raise</p> <p>6 Co-Alliance's hogs in accordance with</p> <p>7 Co-Alliance's contract --</p> <p>8 A. Yes.</p> <p>9 Q. -- right? And if 4/9 -- if 4/9 doesn't do that,</p> <p>10 Co-Alliance can unilaterally in its sole</p> <p>11 discretion back out of the contract with 4/9,</p> <p>12 right?</p> <p>13 MR. BRAUN: Objection. Calls for an</p> <p>14 interpretation of the contract and what</p> <p>15 consequences may flow from an actual or alleged</p> <p>16 breach.</p> <p>17 Subject to that, you may answer the</p> <p>18 question.</p> <p>19 A. Per the terms of the contract, yes.</p> <p>20 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>21 Q. Under the terms of the contract, you would agree</p> <p>22 that 4/9 receives a monthly base payment for</p> <p>23 reservation of the CAFO building and the services</p> <p>24 to be provided for raising a batch of hogs for</p> <p>25 Co-Alliance?</p>

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<p>1 in stirring up support for the opposition and she</p> <p>2 didn't have a clear understanding of the position,</p> <p>3 so I -- you know -- decided I didn't need to</p> <p>4 support that.</p> <p>5 Q. So you don't believe that the Konters have any</p> <p>6 legitimate concerns with respect to the 4/9 CAFO?</p> <p>7 A. I don't know.</p> <p>8 Q. You just think that they're doing this to harass</p> <p>9 Co-Alliance?</p> <p>10 A. Are they part of the lawsuit?</p> <p>11 Q. I'm asking the questions.</p> <p>12 A. I don't believe they're part of the lawsuit, so</p> <p>13 I -- it's my understanding they're not part of the</p> <p>14 lawsuit, so --</p> <p>15 Q. What did you mean by they're stirring up the</p> <p>16 opposition then if that was why you canceled the</p> <p>17 lawn service agreement?</p> <p>18 A. Early on in my understanding is Debbie Konter was</p> <p>19 out -- was out getting the neighbors involved.</p> <p>20 Q. You feel that the neighbors don't have a right to</p> <p>21 be concerned about 8,000 hogs and the waste that a</p> <p>22 CAFO produces coming into their neighborhood?</p> <p>23 A. I think as long as that CAFO has met I-D --</p> <p>24 I-D-E-M and has a permit and has met the</p> <p>25 regulations by the State of Indiana and has met</p>	<p>1 MR. BRAUN: I don't have any questions.</p> <p>2 MR. EHRIE: No questions.</p> <p>3 MR. BRAUN: He'd like the chance to read</p> <p>4 it and sign it.</p> <p>5</p> <p>6</p> <p>7 AND FURTHER DEPONENT SAITH NOT,</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>(2:14 p.m.)</p> <p>KEVIN A. STILL</p>
Page 167	Page 169
<p>1 the local Zoning Ordin -- Ordinance that</p> <p>2 specifically states about CAFOs, I support the</p> <p>3 CAFO.</p> <p>4 Q. Thank you. That wasn't my question.</p> <p>5 Did you feel that the Konters and the</p> <p>6 neighbors had no right to be concerned about</p> <p>7 8,000 hogs and waste produced by those hogs coming</p> <p>8 into their neighborhood?</p> <p>9 A. No.</p> <p>10 Q. They had no right?</p> <p>11 A. I'm not saying they don't -- I don't -- I can't</p> <p>12 judge on what rights they have. Everybody has a</p> <p>13 right to bring a suit.</p> <p>14 Q. But you felt that they were -- had no basis in</p> <p>15 order to be concerned about their -- their</p> <p>16 properties in that way?</p> <p>17 A. No.</p> <p>18 Q. And that's why you canceled the lawn contract,</p> <p>19 because they did raise those concerns?</p> <p>20 A. Yes.</p> <p>21 Q. Anyone else that you've spoken with from the</p> <p>22 surround -- neighbors that surrounded the</p> <p>23 4/9 CAFO?</p> <p>24 A. No.</p> <p>25 MS. FERRARO: I think that's all I have.</p>	<p>1 STATE OF INDIANA)</p> <p>2)SS:</p> <p>3 COUNTY OF MARION)</p> <p>4</p> <p>5 I, Linda M. Bour, a Notary Public in and</p> <p>6 for the County of Marion, State of Indiana, do</p> <p>7 hereby certify that KEVIN A. STILL, the deponent</p> <p>8 herein, was by me first duly sworn to tell the</p> <p>9 truth, the whole truth, and nothing but the truth</p> <p>10 in the aforementioned matter;</p> <p>11 That the foregoing deposition was taken on</p> <p>12 behalf of the Plaintiff at the offices of</p> <p>13 Harrington Law, P.C., 105 North Washington Street,</p> <p>14 Danville, Hendricks County, Indiana on October 5,</p> <p>15 2016 commencing at the hour of 9:00 a.m.;</p> <p>16 That said deposition was taken down in</p> <p>17 stenographic notes and afterwards reduced to</p> <p>18 typewriting under my direction, and that the</p> <p>19 typewritten transcript is a true and accurate</p> <p>20 record of the testimony given by said deponent;</p> <p>21 and thereafter presented to said deponent for his</p> <p>22 signature;</p> <p>23 That the parties were represented by</p> <p>24 themselves or their aforementioned counsel.</p> <p>25 I do further certify that I am a</p> <p>disinterested person in this cause of action; that</p>

1 I am not a relative or attorney of any of the
2 parties, or otherwise interested in the event of
3 this action, and am not in the employ of the
4 attorneys for any of the parties.

5 IN WITNESS WHEREOF, I have hereunto set my
6 hand and affixed my notarial seal this ____ day of
7 _____, ____.

8
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11

12 _____
13 Linda M. Bour, Notary Public,
14 Residing in Marion County, Indiana
15 My Commission Expires: June 19, 2024
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1 I am not a relative or attorney of any of the
2 parties, or otherwise interested in the event of
3 this action, and am not in the employ of the
4 attorneys for any of the parties.

5 IN WITNESS WHEREOF, I have hereunto set my
6 hand and affixed my notarial seal this 18TH day of
7 OCTOBER, 2016.

8

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10

11

Linda M. Bour

12

Linda M. Bour, Notary Public,
Residing in Marion County, Indiana
My Commission Expires: June 19, 2024

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Alliance

Court Reporting

P.O. Box 78261
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**CERTIFICATE OF NOTARY AS TO
FAILURE OF WITNESS TO SIGN TRANSCRIPT
WITHIN TIME ALLOWED BY TRIAL RULES**

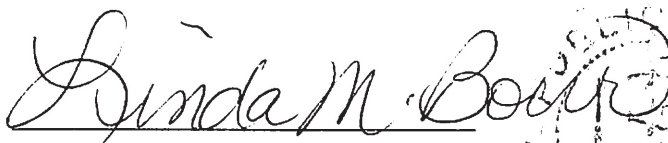
I hereby certify that LINDA M. BOUR, a Notary Public in and for the County of BOONE, State of Indiana, administered an oath at the deposition of KEVIN A. STILL on the 5TH day of OCTOBER, 2016;

That said deposition transcript was made available to the witness for reviewing and signing under the applicable rules of procedure;

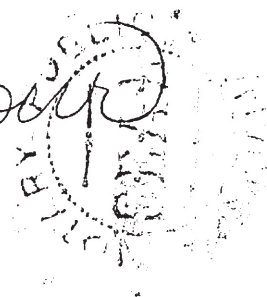
That the original transcript was either/or

- ☐ RETURNED UNSIGNED
☐ RETAINED BY THE WITNESS
☒ WITNESS FAILED TO SIGN WITHIN TIME PERIOD ALLOWED UNDER RULES.
☐ OTHER EXPLANATION GIVEN _____

We are therefore filing this original unsigned transcript on this 20TH day of JANUARY, 20 17.


LINDA M. BOUR, NOTARY PUBLIC

County of Residence: MARION
Commission Expires: JUNE 19, 2024



STATE OF INDIANA	)	IN THE HENDRICKS SUPERIOR COURT
)	
	SS:	
COUNTY OF HENDRICKS	)	CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and SUSAN M.)
LANNON,)

Plaintiffs,)

vs.)

SAMUEL T. HIMSEL, CORY M. HIMSEL,)
CLINTON S. HIMSEL, 4/9 LIVESTOCK, LLC,)
and CO-ALLIANCE, LLP,)

Defendants.)

AFFIDAVIT OF CHARLES M. MCGINLEY, P.E.

I, CHARLES M. MCGINLEY, declare under penalty of perjury as follows:

1. I am qualified to provide a professional opinion regarding livestock industry standards and best management practices (BMPs) that the Defendants should have followed when siting the concentrated animal feeding operation (CAFO) at issue in this case to avoid degrading air quality and creating nuisance conditions for existing residences. In 2010 and again in 2015 I served the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) as an expert air quality and odor management volunteer on the Livestock Siting Technical Expert Committee reviewing livestock facility siting standards under Wisconsin's ATCP 51 Wisconsin Administrative Code (CAFO siting rule).

2. I am a licensed professional engineer in the state of Minnesota with a bachelor's of science in chemical engineering from the University of Minnesota (1970) and a masters of business administration from the University of St. Thomas (1978). In 1966 I received advanced training by the U.S Army Chemical Corp at Fort Leonardwood, MO in chemical and biological defensive warfare, including the dispersion of gases and aerosols on the battlefield. From 1967 to 1972 and from 1974 to 1977 I was an instructor of chemical and biological defensive warfare for the U.S. Army Reserve Combat Engineers at Fort Snelling, MN and the Minnesota National Guard Infantry, respectively. Since 1967, commencing with my employment with the 3M Company to present, I have been involved in odor issues and the science of odor chemistry. I have worked in the field of odor investigation since 1974, first with my employment as an enforcement engineer with the Minnesota Pollution Control Agency assigned to odorous industrial, food processing, agricultural business, and sewer districts. From 1977 to 1980 I was the manager of engineering for the Hormel Environmental Systems Division, responsible for research and development, design and manufacturing, and installation and testing of odor management systems, including systems for agricultural facilities. I currently work as an

Environmental Consultant and an owner of two businesses: McGinley Associates, P.A. and St. Croix Sensory, Inc. Since 1980, I have studied and practiced in the field of odor management, which incorporates the fields of chemical, environmental, and agricultural engineering, including waste collection systems and treatment. I hold three U.S. Patents on “odor detection, odor measurement, and odor inspection”. I have authored numerous peer reviewed technical papers and articles on the subject of odor generation, odor measurement, and odor control, including documents titled; “a Detailed Assessment of the Science and Technology of Odor Measurement” (2003) and “A Review of the Science and Technology of Odor Measurement” (2005) commissioned by the Minnesota Pollution Control Agency and the Iowa Department of Natural Resources, respectively. I worked with the University of Minnesota Extension Manure Management and Air Quality Team collaborating in the development of OFFSET, odor setback estimation tool for CAFOs. My C.V. is attached hereto.

3. At the request of Kim Ferraro, attorney with the Hoosier Environmental Council, a non-profit environmental organization representing Plaintiffs in this case, I reviewed various documents including: Plaintiffs’ Complaint; Plaintiffs’ and Defendants’ interrogatory answers and various documents produced in discovery; public records from the Indiana Department of Environmental Management (IDEM) and Hendricks County; the deposition transcripts of Cory, Clint and Samuel Himself, Kevin Still and Sam Moffett including exhibits; the Affidavit of Dr. Mark Chernaik; and odor observation reports of Plaintiffs. I also reviewed various pork industry, government and academic publications and studies regarding the assessment and mitigation of odorous compounds from CAFOs; applicable agricultural and biological engineering standards; and odor setback models all identified specifically below.

4. Examining these items, and based on my education, training and experience, I have reached the following professional opinions and conclusions:

a. The Defendants knew or should have known that siting the at-issue CAFO within a half mile and upwind from Plaintiffs’ homes would degrade air quality and create nuisance conditions for Plaintiffs.

The U.S. Congressional Research Service (CRS) noted in a recent report on *Air Quality Issues and Animal Agriculture* that, “for more than two decades, organizational changes within the [livestock] industry to enhance economic efficiency have resulted in larger confined production facilities that often are geographically concentrated. Increased facility size, greater numbers of animals being raised at large feedlots, and regional concentration of livestock and poultry operations have, in turn, given rise to concerns over the management of animal wastes from these facilities and potential impacts on environmental quality.¹” A specific concern is the fact that CAFOs can adversely affect air quality, human health, and create nuisance conditions for neighbors due to emissions of offensive and dangerous gases including ammonia and hydrogen sulfide, particulate matter (PM), volatile organic compounds (VOCs), hazardous air pollutants, microorganisms, and odor.²

¹ U.S. Congressional Research Service. *Air Quality Issues and Animal Agriculture: A Primer* (RL32948; Dec. 22, 2014), by Claudia Copeland, at 1.

² *Id.* at 2.

This information is not new. CAFO air emissions and their impacts have been widely studied and reported by federal and state governments, academic institutions, and the livestock industry itself for many years.³ Indeed, the National Pork Producers Council (NPPC) advised its members back in 2000 that they “have a responsibility to manage their systems as to minimize odor and any adverse impacts on their neighbors.”⁴ Accordingly, the NPPC announced that it had “funded research aimed at developing new technologies for controlling odor” and that the “pork industry [was] investing millions of dollars in odor research.”⁵ In addition, the NPPC announced it was spending \$5 million on two programs “to develop innovative solutions for minimizing or eliminating odor problems on pork production operations” and “provide producers on-farm assistance with odor management”⁶ – programs which the Defendants’ environmental consultant, Michael Veenhuizen, helped to develop.⁷

The following year, in June of 2001, then Iowa Governor Tom Vilsack – now U.S. Secretary of Agriculture -- asked the Presidents of Iowa State University and of The University of Iowa “to assist the Iowa Department of Natural Resources and the Environmental Protection Commission with addressing public health and environmental concerns arising from air emissions from concentrated animal feeding operations (CAFOs).”⁸ In response, the universities undertook a comprehensive review of the scientific literature and prepared a peer-reviewed report with the following findings and recommendations:

CAFO air emissions may constitute a public health hazard and that precautions should be taken to minimize both specific chemical exposures (hydrogen sulfide and ammonia) and mixed exposures (including odor) arising from CAFOs.

Odors have been a major concern of residents in the vicinity of CAFOs.

[A]mbient air quality standards [should] be developed to regulate the concentration of hydrogen sulfide, ammonia and odor.

The effects of siting large CAFOs in or near communities should be recognized and used in making informed decisions on permitting facilities.

Proper siting of new CAFOs should take into account “proposed facility size and type, distance and orientation to surrounding neighbors, local weather patterns, odor control measures, existing recreational and public-use facilities, and other

³ See e.g., NPPC, *1999/2000 Pork Issues Handbook*, p. 6 (Sept. 1999) (announcing that [t]he pork industry is investing millions of dollars in odor research); David R. Schmidt, et al., National Center for Manure and Animal Waste Management, *Air Quality and Emissions from Livestock and Poultry Production/Waste Management Systems*, North Carolina State University, (Aug. 12, 2002); National Academies of Sciences, *Air Emissions from Animal Feeding Operations, Current Knowledge, Future Needs* (2003).

⁴ NPPC, *1999/2000 Pork Issues Handbook* at 7 attached as Exh. 20 to the Deposition of Cory Himself.

⁵ *Id.* at 6.

⁶ *Id.*

⁷ *Free On-Farm Odor Assessments, National Hog Farmer* (Dec. 1, 1997) (identifying Michael Veenhuizen as one of the engineers involved in developing the programs) attached as Exhibit 21 to the Deposition of Cory Himself.

⁸ University of Iowa and University of Iowa Study Group, *Iowa Concentrated Animal Feeding Operations Air Quality Study, Final Report*, at 4.

existing production facilities in a community. . . . Siting models that utilize [these] inputs have been developed, are currently being calibrated, and should be used in community-wide applications.^[9]

As in Iowa, the public health concern about unregulated emissions from the “massive quantities of manure, urine and other wastes” produced by CAFOs was growing nationally.¹⁰ As a result, in 2005, U.S. EPA reached an “Air Compliance Agreement” with representatives from the livestock industry, including the NPPC, which required “the nearly 2,600 participating AFOs to pay a civil penalty for potential past and ongoing [Clean Air Act (CAA)] violations, to fund the national air emissions monitoring study, . . . make their facilities available for monitoring [and] . . . take all necessary steps to come into compliance with the CAA and applicable reporting requirements.^[11]” Himsel Brothers and Northwind Pork, LLC – Defendants’ related entities -- were signatories to the EPA Air Compliance Agreement.¹²

In 2008, U.S. EPA finalized a new rule requiring “all large CAFOs, including operations with 2,500 head of finishing swine or more, must notify state and local emergency response officials about ammonia and hydrogen sulfide emissions from their operations if they emit 100 pounds or more of these substances during any 24 hour period.^[13]” The NPPC prepared a detailed “Fact Sheet” for its members about the new EPA rule explaining:

pork producers whose operations are not currently participating in the EPA Air Consent Agreement should seriously consider initiating the reporting process on this date by making a telephone call to your state emergency response authority and also your local emergency response authority. A written report must be submitted within 30 days after the telephone call was made. Failure to make the telephone call by January 20, 2009 or submit a follow-up written report may subject producers to severe penalties of \$25,000 per day, as well as potential criminal liability for knowingly failing to report. Producers who have signed an EPA Air Consent Agreement need not submit reports until that National Air Emissions Monitoring Study (NAEMS) is completed, on or about January 1, 2010.¹⁴

The Defendants have been engaged in pork production for decades and are long time members of the NPPC and its state affiliate, the Indiana Pork Producers Association (IPPA). Moreover, Defendant Co-Alliance employees and board members have held leadership positions with the NPPC and the IPPA.¹⁵ Therefore, even if the Defendants were not directly involved in

⁹ *Id.* at 7-9, 14-16.

¹⁰ U.S. EPA, Enforcement Alert, *Large Animal Feeding Operations: Reducing Their Impact on Air Quality*, Vol. 9, No. 4 (Aug. 2008) attached as Exhibit 61 to the Deposition of Kevin Still.

¹¹ *Id.* at 2.

¹² U.S. EPA, Civil Enforcement Case Report, HQ-2006-0384 (identifying Himsel Brothers as a participating AFO to the Air Compliance Agreement); U.S. EPA, Civil Enforcement Case Report, HQ-2006-0278 (identifying Northwind Pork, LLC as a participating AFO to the Air Compliance Agreement); Deposition of Kevin Still, p. 97.

¹³ : NPPC, *CERCLA-EPCRA Fact Sheet*, p. 1 (Jan. 14, 2009) attached as Exh. 28 to the Deposition of Cory Himsel.

¹⁴ *Id.* (emphasis in original)

¹⁵ Deposition of Sam Moffett, pp. 183-185; Deposition of Kevin Still, p. 58.

this significant regulatory development, they would have learned about it through their membership and involvement with the NPPC and IPPA.

In any event, Kevin Still, CEO of Defendant Co-Alliance knew at the time the decision was made to build the at-issue CAFO, that CAFO odor and air issues were a “public perception” concern to the pork industry because of the effect on neighbors and the lawsuits that had arisen all around the country.¹⁶ According to Mr. Still, it was “common knowledge” in the pork industry that hog CAFOs emit odorous compounds that can be offensive to people.¹⁷ He was personally aware of the regulatory concern for emissions of hydrogen sulfide and ammonia from hog CAFOs, that the National Pork Board (NPB) had developed BMPs for controlling those emissions, and that “many nuisance lawsuits [had] been brought over the preceding decades against hog CAFO owner/operators around the country, including in Indiana, by neighbors who allege[d] their ability to live comfortably in their homes [had been] impacted from the noxious odors and air emissions emitted from nearby hog CAFOs.”¹⁸

Consistent with this “common knowledge,” Hendricks County created a new “Agriculture Intense-AGI” zoning district in 2008 “to provide adequate and appropriate locations for intense agricultural uses such as CAFOs or agricultural businesses that may emit intense odors, vibrations, air pollution, or other disruptions [and] to protect both the agricultural use and residential and commercial property owners from nuisance claims.”¹⁹ All of the Defendants testified that they were aware of this when the individual Himsel Defendants sought to rezone their property from AGR to AGI to allow for construction of the CAFO.

The Defendants knew or should have known that siting the at-issue CAFO where they did would degrade air quality and create nuisance conditions for Plaintiffs based on guidance and best practices for preventing odor and air quality impacts on neighbors developed by the pork industry itself. In 2006-2007, the NPB developed best management practices for mitigating odor and air quality impacts from hog CAFOs that were published in several brochures available on the NPB’s website and made user-friendly in a web-based air quality tool “to assist [pork] producers in identifying practices to address air quality issues on their farm.”²⁰ In its brochures, the NPB advises pork producers, among other things, that:

Swine farms have the potential to emit various gasses that can serve as a source of odors and that can affect the quality of the air surrounding the farm . . . Numerous compounds have been identified from the anaerobic degradation of animal manure. These have been generally grouped as volatile sulfur compounds, indoles and phenols, volatile fatty acids, ammonia and volatile amines.²¹

¹⁶ Deposition of Kevin Still, p. 92.

¹⁷ Deposition of Kevin Still, pp. 95-96;

¹⁸ Deposition of Kevin Still, pp. 97-99.

¹⁹ Deposition of Cory Himsel, pp. 214-216

²⁰ Deposition of Sam Moffett, pp. 220-223.

²¹ National Pork Board, *Feed Management Practices to Minimize Odors from Swine Operations*, Pork Checkoff brochure (May, 2007).

Ventilation air leaving the [CAFO] building carries with it a potential to impact neighbors downwind from the facility. . . . Dust particles absorb odorous compounds, essentially carrying it directly to a person's nose.²²

The best time to reduce the potential for odor and odor complaints from any swine facility is before the site is constructed . . . The predominant direction of the wind is an important factor in examining the potential impact on neighbors . . . locating a swine unit directly [upwind] of neighbors would not be wise . . . Distance is always good in minimizing the odor potential to neighbors [which] not only decreases the exposure angle but also provides an opportunity for more stirring and dissipation of the air plume from a swine unit. In odor transport, there is no substitute for increased separation distance.²³

Finally, the American Society of Agricultural and Biological Engineers (ASABE) developed a standard for "Management of Manure Odors" at CAFOs,²⁴ which certainly applied to the work of Defendants' environmental consultant in this case -- Michael Veenhuizen -- who is an Agricultural and Biological Engineer. That engineering standard expressly recognizes animal manure odors to be "a nuisance" that exists "whenever odorous compounds are emitted and transported to an area in which their presence is offensive to people."^{25]} To avoid the potential for nuisance disputes, the ASABE standard sets site selection criteria including: 1) a "reasonable separation distance between animal enterprises and neighboring residences and public areas" that should be determined "through the use of a verified computer model/tool[;]" 2) consideration of "[w]ind direction probability data during the times of the year commonly associated with outdoor recreational activities . . . to manage the frequency of odor transport to neighboring homes, businesses and institutions[;]" and 3) siting the CAFO "at a lower elevation than the neighbors in low lying or valley areas to avoid the odor movement downslope/downhill on calm days and cool nights."^{26]}

The Defendants failed to follow these engineering standards and pork industry BMPs for site selection and thereby breached the applicable standard of care when they decided to construct and operate a CAFO with 8,000 finishing hogs upwind and within a half mile of Plaintiffs' homes.

b. The Defendants failed to follow pork industry guidance, standards and best management practices by constructing and operating the at-issue CAFO upwind and within a half mile of Plaintiffs' homes.

Siting the at-issue CAFO without regard to the industry's own readily available guidance and recommendations and failing to utilize readily available setback models and tools as required

²² National Pork Board, *Basic Management Practices to Mitigate and Control Odors from Swine Operations*, Pork Checkoff brochure (May, 2007).

²³ National Pork Board, *Siting and Building Design Considerations to Reduce Odor Potential from Swine Facilities*, Pork Checkoff brochure (May, 2007).

²⁴ ASABE, *Management of Manure Odors*, ASAE EP379.5 APR2012.

²⁵ *Id.* at 1.

²⁶ *Id.* at 4-5, Sec. 6.2 - Site Section.

by applicable agriculture and biological engineering standards, the Defendants created air quality risks with exposure to irritating and malodor air chemistry for people who live nearby.

In their IDEM application for a permit to construct the CAFO, Defendants identified 23 residences, 36 individuals, and 4 family trust properties within 1/2 mile of the location chosen to build the CAFO. This demonstrates the Defendants clear knowledge of the proximity of existing residents to the CAFO they planned to build.²⁷ And, these residents all clearly understood the threat to their air quality posed by the noxious odors and air emissions the CAFO would emit as indicated by their overwhelming opposition and testimony at the public hearing on the Defendant's rezoning request.²⁸ Nevertheless, the Defendants ignored these residents' concerns and failed to even consider, much less follow, the standard siting criteria for avoiding adverse odor and air quality impacts on these residents.²⁹

The body of knowledge embraced by the pork industry provided sufficient guidance in set-back distances to avoid malodor nuisance to citizens and properties. Various siting models have been developed to avoid the degradation of air quality such as that now being suffered by Plaintiffs³⁰ including, among others, the "Odor From Feedlots Setback Estimation Tool (OFFSET)" developed by the University of Minnesota,³¹ the Purdue University Livestock Odor Setback Model,³² and Wisconsin's ATCP 51 Administrative Code Livestock Siting Rule. Each of these tools set forth siting criteria and advance odor management practices providing facility managers with rational and common sense decision making information for planning a CAFO. The industry tools and rules available to the Defendants were callously ignored. The Defendants did not follow industry standard of care and basic common sense.

The Defendants siting decision, given type of facility, large number of finishing hogs, prevailing winds,³³ flat terrain in the area, and close proximity to Plaintiffs' and other residents' homes, was a prescription for predicable significant malodor annoyance and nuisance for Plaintiffs and other nearby residents.

My opinions and testimony offered in this case have been formulated in accordance with the sound scientific methods generally accepted in the fields of odor management.

I affirm and declare, under penalty of perjury, that the foregoing representation(s) are true and correct.

²⁷ IDEM Application, Worksheet II.B. Parties Notified by Applicant, One-Half (1/2) Mile List, 4/9 Livestock, LLC (April 16, 2013)

²⁸ Partial Transcripts in the Matter of ZA 418/13-attached as Exhibits 31 and 33 to the Deposition of Kevin Still.

²⁹ Deposition of Cory Hinsel, pp. 87-91; Deposition of Kevin Still, pp. 111-112

³⁰ Affidavit of Mark Chernaik, Ph.D.; Plaintiffs' Interrogatory Answers.

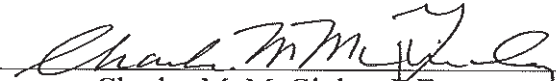
³¹ Odor From Feedlots Setback Estimation Tool (OFFSET), University of Minnesota available at <http://www.extension.umn.edu/agriculture/manure-management-and-air-quality/feedlots-and-manure-storage/offset-odor-from-feedlots/>

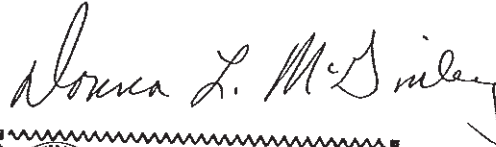
³² Purdue Agriculture Air Quality Lab, Livestock Odor Setback Model available at <https://engineering.purdue.edu/~odor/setback.htm>

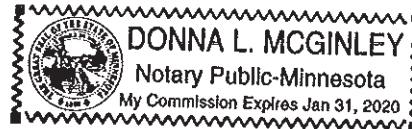
³³ Available data from the Indianapolis weather station which is the closest of available weather stations (17.4 miles from the site) indicates that winds are from the southwest 18.7% of the time.

Executed in Stillwater, Minnesota, on December 15, 2016.

Date: December 15, 2016


Charles M. McGinley, P.E.





12/15/2016

CURRICULUM VITAE

Charles M. McGinley, P.E.
Odor Management Consultant
McGinley Associates, P.A.

13701-30th St Cr N
Stillwater, Minnesota 55082 USA
Phone: 651.338-8341
Fax: 651.439.1065
E-Mail: cmcginley@fivesenses.com

CERTIFICATION AND LICENSURE:

1975 Registered Professional Engineer in Minnesota, Reg. No. 11871

EDUCATION:

1978 Masters Degree in Business Administration, (MBA)
University of St. Thomas, St. Paul, Minnesota
1970 Bachelor of Chemical Engineering (BChE)
University of Minnesota, Minneapolis, Minnesota
1966 U.S. Army, Fort Leonard Wood, Missouri

MEMBERSHIPS:

1981-Present Water Environment Federation
1974-Present Air & Waste Management Association

INDUSTRY LEADERSHIP:

“A Review of the Science and Technology of Odor Measurement.” Prepared for the Air Quality Bureau of the Iowa Department of Natural Resources, Des Moines, IA. 5 December 2005.

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Lecturer for CONAMA, National Commission for the Environment, Environmental Regulation Department, Republic of Chile, 1999.

Contributing Author, “Odor Monitoring & Standards”, “Operations & Design to Control Ultimate Recycling & Disposal Odors of Biosolids Workshop”, EPA National Biosolids Partnership, November 1999.

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Investigating Engineer for the Sydney Water Board "Clean Waterways Program", 1991-1993.

Instructor, "Odor Control for Designing Wastewater Pumping Stations", University of Wisconsin – Madison, College of Engineering, April 1991.

POSITIONS:

1980-Present Principal Engineer, Consultant, McGinley Associates, P.A.

1990-Present Technical Director, St. Croix Sensory, Inc.

1977-80 Manager of Environmental Engineering, Geo. A. Hormel & Co.

1974-77 Senior Enforcement Engineer, Minnesota Pollution Control Agency

1967-74 Senior Chemical Engineer, 3M Company

1966-77 Minnesota National Guard and US Army Reserve, Fort Snelling, Minnesota

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U.S. Patent No. 8,321,156B2 "Odor Inspection System", 27 November 2012.

PROFESSIONAL BUSINESS PROFILE:

Charles M. McGinley, P.E. is the principal of McGinley Associates, P.A., with over 40 years of experience specializing in odor management issues. Since 1980, Charles McGinley has provided services, testing, and training ("ODOR SCHOOL"®.) to a broad range of municipal, government, and industrial concerns in the United States and internationally.

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ASAE EP379.5 APR2012
Management of Manure Odors



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ASABE, 2950 Niles Road, St. Joseph, MI 49085-9659, USA, phone 269-429-0300, fax 269-429-3852, hq@asabe.org

ASAE EP379.5 APR2012**Management of Manure Odors**

Developed by the ASAE Agricultural Sanitation and Waste Management Committee; approved by the ASAE Structures and Environment Division Standards Committee; adopted by ASAE December 1975; reconfirmed December 1980, December 1985; revised December 1986; reconfirmed December 1991; revised November 1997; reaffirmed February 2003; revised July 2005; revised January 2007; revised April 2012.

Keywords: Manure, Odors, Waste

1 Purpose and scope

1.1 Principles of odor generation, emission, transport, and detection are the subject of continuing investigation. Many aspects of the relevant processes are not completely understood at this time. Decisions relating to odor management therefore represent judgments based upon available knowledge.

1.2 Animal manure odors are presently considered a nuisance. The practices described in this standard were based on the assumption that manure odors have no effect on human health, albeit the effect of odor on human health is under investigation. Odorous gases produced by manure that are considered a human health risk are specifically addressed under ASAE EP470, Manure Storage Safety standard.

1.3 This Engineering Practice is prepared to assist engineers, pollution control officials, land use planners, and animal producers in the location, planning, construction, and operation of animal holding and production enterprises so that potential societal conflicts and air quality deterioration caused by manure odors might be managed. Areas covered are: Source and identification of odors, Measurement of odor intensity, Techniques to manage the formation of manure odors and Managing animal enterprises for odor.

2 Normative references

The following referenced documents are indispensable for the application of this document. For dated references, only the edition cited applies unless noted. For undated references, the latest approved edition of the referenced document (including any amendments) applies.

2.1 ANSI/ASAE EP403, Design of Anaerobic Lagoons for Animal Waste Management

2.2 ASTM E679, Standard Practice for Determination of Odor and Taste Thresholds by a Forced-Choice Ascending Concentration Series Method of Limits

2.3 ASTM E544, Standard Practices for Referencing Suprathreshold Odor Intensity

3 Source and identification of odors

3.1 Odors associated with animal enterprises are most frequently attributable to manure management practices. Odorous compounds include inorganic and organic vapors and gases. They can be generated at a number of sites around an animal enterprise. The most common odor sources, however, are open feedlot surfaces; manure collection, transport, storage, and treatment facilities; floors and other surfaces of buildings; animal body surfaces; feed handling and storage facilities; dead animal storage and disposal areas; and land on which manure has been applied.

3.2 Objectionable odors exist whenever odorous compounds are emitted and transported to an area in which their presence is offensive to people. Emission of an odorous compound from manure is related to the volatility

of the compound in question, the physical and chemical properties of the manure in which the odorous compound is produced, temperature, and air movement over the manure surface.

3.3 Odorous compounds are produced primarily from anaerobic decomposition of manure. More than 150 compounds have been identified to contribute to the malodors of the decomposing manure. The major groups of these compounds are listed in Table 1.

Table 1 – Typical compounds resulting from the anaerobic decomposition of animal manure

Volatile Fatty Acids Acetic Propionic Butyric Isobutyric Isovaleric	Sulfides Hydrogen sulfide Dimethylsulfide Diethylsulfide Disulfides
Alcohols	Ammonia and Amines
Aldehydes	Ammonia
Esters	Methylamine
Phenols and Cresols	Ethylamine
Phenol	Dimethylamine
p-Ethyl-phenol	Trimethylamine
p-Cresol	Diethylamine
Mercaptans	Nitrogen Heterocycles
Methylmercaptan	Indole
Ethylmercaptan	Skatole
Propylmercaptan	Odorless Gases
	Carbon Dioxide
	Methane

3.4 Odor nuisance is generally defined by four factors: frequency, intensity, duration, and offensiveness. Odor sensation is a personal response. Odor observers are not equally sensitive, nor do they always agree as to the severity of an odor once it is detected. Odor intensity fluctuates with climatic conditions, such as wind direction, temperature, and atmospheric stability. Thus documentation of the strength and nature of odors should focus on specific sites and specific sources at those sites. If it is not possible to visit the site in question, a comparative site can be used if the nature of the operation and climatic conditions are similar.

4 Measurement of odor concentration and odor intensity

4.1 The odorant (or odorous compound) in the air may be expressed by two types of odor thresholds, odor detection threshold and odor recognition threshold. The odor detection threshold is defined as the lowest concentration of the compound in the air that can be detected by the human olfactory sense, i.e. the presence of odor is noticed. The odor recognition threshold is defined as the lowest concentration of the compound in the air that can be recognized by humans, i.e. what the odor smells like. The odor threshold of manure odors is a measured mixture of odorous compounds. Odor threshold is used to evaluate the effects of different manure treatment and management practices on odor reduction at animal production enterprises.

4.2 Two basic types of measurement have been developed and used for measuring odor. Direct or sensory methods involve the use of the human nose, generally in the form of a panel of trained observers (also called panelists). Indirect methods measure the concentrations of individual compounds or groups of compounds in the air and correlate the concentration data with sensory methods specifically.

4.2.1 Direct measurement methods fall into two major categories: scaling and dilution. The scaling technique involves asking a panelist to rate the odor intensity on a numerical scale or referencing the odor intensity to the intensity of a known odorant. The most common reference odorant is 1-butanol (a.k.a. n-butyl alcohol or butyl-alcohol). The dilution technique involves diluting the sample with either odor-free liquid or gas to determine the threshold at which the odor is barely detectable. The instruments used for measuring the threshold include scentometers and olfactometers. A standard practice for determination of the odor threshold by a forced-choice ascending concentration series method using an olfactometer is contained in ASTM E544. A more comprehensive assessment of odor is achieved by evaluating odor concentration, intensity, and hedonic tone.

4.2.2 Indirect measurement methods involve measurement of the concentrations of constituent compounds that are present in the odorous air. Ammonia and hydrogen sulfide have been the two constituents most commonly measured to evaluate animal manure odors, but several studies have shown poor correlation between concentrations of ammonia and hydrogen sulfide with the odor concentration and odor intensity. Gas chromatography-mass spectrometry (GC-MS) is the technique generally used for identifying individual compounds with certainty. The combination of GC-MS with an olfactory port (GC-MS-O) allows for simultaneous chemical and olfactory analysis of individual compounds. GC-MS-O is a helpful technique that can be used to identify the compounds that contribute most to the odors. Concentrations of odorous compounds must be correlated with human sensory odor measurement in order to be meaningful for odor concentration and intensity quantification.

5 Techniques to manage the formation of manure odors

5.1 Odorous compounds emitted during collection, transport, storage, treatment, and land application of animal manure are principally the products of natural microbial metabolism under anaerobic conditions. The methods for managing the formation of these compounds include applications of various physical, chemical, and biological treatment processes. The major techniques are listed below.

5.1.1 Drying is effective for inhibiting anaerobic microbial decomposition although it may be impractical due to high energy costs. When the moisture content of manure is lowered to 50% or less, the manure is sufficiently porous to permit air diffusion and to virtually preclude anaerobic decomposition.

5.1.2 Solid separation from liquid manure may reduce the odor generation potential in the liquid storage facilities by removing some of the organic carbon that can undergo anaerobic decomposition. Most readily degradable organic carbon is contained in fine particles of manure. To effectively reduce the odor generation potential of separated liquid, removal of fine particles is necessary. Separated manure solids need to be dried, composted, or otherwise conditioned, however, to manage odor generation and fly propagation.

5.1.3 Disinfection can be used to kill the microorganisms present in the manure and stop anaerobic decomposition. Chlorine, hydrogen peroxide, ozone, and other chemical disinfectants have been used in treating dilute wastewater. The costs of these chemicals may be too high to treat raw animal manure. Adjustment of the pH in the manure has also proven effective in reducing microbial activities. A pH above 9.0 has been documented as effective in reducing the manure odors but the increase of pH will result in greater ammonia volatilization from the manure. Thus the tradeoff between odor and ammonia volatilization must be evaluated locally before pH adjustment is recommended.

5.1.4 Aeration can be used to manage the odor generation by preventing anaerobic decomposition. Two basic aerobic treatment methods are completely mixed aeration in a treatment vessel and extended surface aeration in a manure storage or treatment lagoon. The aeration requirement for odor management depends on the characteristics of manure in treatment, temperature, type of treatment, and length of post-treatment storage. Supplying oxygen to satisfy one third to one half of the biochemical oxygen demand can reduce odor generation while minimizing energy costs.

5.1.5 Anaerobic digestion can stabilize the organic matter in the manure in a sealed vessel. The odorous gases produced during the anaerobic process are captured and can be removed from the gas stream by chemical or biological scrubbing or thermal-chemical conversion techniques. The offensive odors generated from digested liquid and sludge, if stored in separate facilities, will be minimal.

5.1.6 Composting of solid manure is effective in stabilizing the manure for odor management. The moisture content of the manure needs to be 40% to 60% for effective composting and the carbon to nitrogen ratio should be between 20:1 and 30:1. If the moisture content of the manure is too high and/or the carbon to nitrogen ratio is too low, other organic materials, such as straw, cotton gin trash, and recycled newspaper, can be used to adjust these two parameters to proper levels. The proper use of a bulking agent will also increase oxygen diffusion into the compost. Ammonia volatilization may be high during the early stage of the composting, but the composted products will have minimal odors during subsequent storage and land application.

5.2 A variety of odor management products designed to aid in odor management are on the market. These products are of chemical, enzymatic, and/or bacterial nature. Some of these products have been found to be effective in reducing odors. It is advised to conduct careful laboratory and field evaluations of commercial odor management products before they are purchased in large quantities. Four major types of chemical products for odor management are described below.

5.2.1 Masking agents are mixtures of volatile oils that have a stronger odor than the manure, and are designed to cover-up the objectionable odor with a more acceptable odor.

5.2.2 Counteractants are the products that have the odor characteristics appropriate to cancel the manure odors so that the total intensity detected is less than that of the mixture of the counteractants and manure.

5.2.3 Deodorants are the products that are used to eliminate or transform the odorous constituents in the manure so that they are not emitted. Deodorants are strong oxidizing agents or chemicals that may inhibit the microbial activities, or alter the digestive process by changing enzyme balances, or simply change the chemistry of odorous compounds by changing the pH of the manure.

5.2.4 Adsorbents are products with large surface areas that may be used to adsorb the odor compounds before they are released to the environment.

5.3 Attempts have been made to manage manure odors by altering animal diet or by the addition of specific odor reducing agents to the diet. Altering the protein content of the diet to balance the amino acid composition to the animal's needs will reduce the potential for odor generation for a given manure management practice. Altering the odor of fresh manure alone by use of certain feed additives does not solve the long term odor problems. Odors will be generated once the manure undergoes anaerobic decomposition.

5.4 Various odor management techniques are available. There are costs associated with implementing these techniques. Manure odor nuisance is often the result of poor housekeeping techniques as well as from problems inherent to manure management. Producers need to develop programs for improving their housekeeping practices or implementing various odor management techniques to solve specific odor problems.

6 Managing animal enterprises for odor

6.1 The degree of annoyance caused by animal and manure odors is a function of physical and social factors. The physical attributes of odors, such as intensity, duration, frequency and offensiveness can be addressed by implementing best management practices. Social factors, such as neighbors' appreciation of animal production practices, neighbors' familiarity with rural environment, and the physical appearance of animal operations all can contribute to the level of tolerance or annoyance associated with odors. Producers' efforts at maintaining good housekeeping and positive public relationships are critical in managing the odor nuisance.

6.2 Site selection. Selecting appropriate sites for animal production with consideration of local geographical, topographical, and meteorological conditions is very important to create environmentally sound and socially acceptable animal production operations.

6.2.1 A reasonable separation distance between animal enterprises and neighboring residences and public areas is necessary for avoiding the potential for disputes over nuisance. Because of the complex interaction of

many factors that contribute to odor from confined animal operations, a single separation distance is not appropriate for all operations. The best method for determining proper facility setbacks is through the use of a verified computer model/tool.

6.2.2 Wind direction probability data during the times of the year commonly associated with outdoor recreational activities should be considered to manage the frequency of odor transport to neighboring homes, businesses and institutions. Locate animal facilities at a lower elevation than the neighbors in low lying or valley areas to avoid the odor movement downslope/downhill on calm days and cool nights.

6.3 Animal housing and feedlots. Odors generated in animal houses and at feedlots are the products of manure decomposition. Any practices to keep the surfaces of animals, floors and equipment clean and dry will help to manage the odor. Dust is a substantial carrier of odors. Management practices that minimize dust generation from animals, feed, and manure are desired. Removal of odorous gases and dust from ventilation air is also effective for odor reduction.

6.3.1 Cleaning of ventilation air can be effective in odor management. Cleaning methods include dust removal by means of filtration and/or electrostatic precipitation, and gas scrubbing by means of physical absorption (activated carbon filters and dry or wet scrubbers), chemical reactions (deodorizers and ozone reactors), and biological oxidation (biofilters). Reduction of dust levels in animal houses by using low dust emission feeding methods or low speed recirculation fans also helps manage the odors and improve air quality.

6.3.2 Manure collection systems should be designed and operated in a manner that will keep animals clean. Warm animals covered with wet manure promote accelerated bacterial growth, odor production, and rapid odor emission into the atmosphere. Manure collection systems that separate the animals from the manure, such as slotted floors and properly designed free stalls, should be used.

6.3.3 Frequent removal of manure from animal houses will reduce the generation of manure odors within the building but may increase the odors from the outside storage or treatment facility. Flushing, scraping, pull-plug, and pit recharge systems are commonly used for manure removal. Adding a layer of water in the shallow pits after the manure is removed will lower the odors of fresh manure.

6.3.4 Feeding areas should be kept dry, and accumulation of waste feed in and around feeding troughs and water access should be minimized.

6.3.5 Maintaining feedlot surfaces and stored manure between 25% to 40% moisture content is an important odor management practice. Select sites with 3% to 6% slopes and exposure to the sun (southern or western) to encourage drainage and drying. Manure and runoff collection and storage systems must be properly designed and operated so that manure and runoff are contained and the water quality around the feedlots is protected. These systems must also provide proper water drainage so that odor management goals are also realized. Applying effective dust control practices is also an important odor management measure around feedlots.

6.3.6 Dead animal disposal requires a definite plan to manage odors, flies, and severe health risks. Removal of mortalities from the production site within 24 hours is required in most areas. Pick-up by rendering services is preferred where this service is available. Burial or composting can be used depending on the local regulations. Incineration is not recommended due to air quality concerns, but may be acceptable for some areas where incineration is allowed by local or state regulations.

6.4 Managing manure storage and treatment facilities. Alternative treatment techniques to manage odor generation from the manure are given in clause 5. The management practices listed below can be used as additional techniques for odor management at manure storage and treatment facilities.

6.4.1 Covering or reducing the surface area of manure storages reduces exposure of the manure to the air and therefore reduces the odor emission rates. Covers can be made of synthetic materials (plastic films and membranes), concrete, or natural materials (manure crusts, peatmoss, or other floating materials). Vents need to be provided for release of pressure created by manure gases if completely sealed covers are used. Vented gases will be odorous, therefore treatment of these gases is recommended. Treatment options may include chemical treatment such as with ozone, or biological such as with biofilters.

6.4.2 Anaerobic lagoons provide partial biological treatment by reducing degradable solids and controlling odors. However, proper functioning of a lagoon is dependent on temperature, organic loading, pH, salt concentrations, and liquid depth. Anaerobic lagoons should be designed and operated according to the guidelines specific for local geographical and climatic conditions. See ASAE EP403. Lagoon design should be based on the maximum anticipated manure load. Excess organic loading will lead to an imbalance of microbial reactions in the lagoons and increase odor generation. Solid-liquid separation prior to the lagoons can reduce the treatment volume requirement in anaerobic lagoons.

6.4.3 Planting trees or installing a vegetative or non-vegetative windbreak barrier around or downwind of the manure storage and treatment facilities as determined by prevailing spring and summer winds can provide a means of disrupting odor transport toward neighbors by diverting airflow above the tree line as well as absorbing some odorous compounds. The trees have the added benefit of creating an appealing landscape.

6.5 Land Application. Manure is beneficial to the land by improving soil structure, increasing water infiltration, recycling nutrients in agricultural systems, and reducing soil erosion. Soils provide a preferred environment for stabilizing organic solids and filtering pathogenic organisms. Soils are excellent adsorbents of odorants but application rates must be determined through proper nutrient management and system design, in accordance with federal and state regulations for nutrient management planning. The following practices will manage odor generation potential during land application of animal manure.

6.5.1 Incorporation of manure into soils during or immediately after land application is effective in managing odor emissions. Incorporation of manure is recommended for sensitive land application sites that are near residential areas, public facilities, and roads. This can be done by 1) soil injection followed by covering with 1-2 inches of soil or 2) soil incorporation to the root depth during or after application. These practices also preserve nutrients and reduce surface water pollution potential.

6.5.2 Equipment that manages the generation of manure aerosols should be used for surface manure application. Keep the manure as close to the ground surface as possible during application by using low trajectory spreading equipment or banding application techniques. Spread manure uniformly and in a layer thin enough to ensure rapid drying and to prevent fly propagation in warm weather. Frequency of surface manure spreading should be managed.

6.5.3 Irrigation by using sprinkler systems is generally acceptable for the manure pumped from properly designed and well-managed lagoons or the liquid manure treated by a proven treatment process such as those listed in clause 5. Evaporation losses should be minimized to manage odors.

6.5.4 Selection of appropriate times for land application is very important for avoiding odor nuisance. Avoid spreading manure when the wind would transport odors toward populated areas, nearby residences, and/or public facilities. Avoid manure application immediately before or on weekends and holidays when people are likely to engage in outdoor recreational activities. Spread or apply manure in the morning when air is warming and rising rather than in the late afternoon. Use available weather information to the best advantage for managing odors. Select times when turbulent breezes will dissipate and dilute odors and dry the manure.

STATE OF INDIANA	)	IN THE HENDRICKS SUPERIOR COURT
)	
COUNTY OF HENDRICKS	)	SS:
	)	CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and SUSAN M.)
LANNON,)

Plaintiffs,)
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vs.)
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SAMUEL T. HIMSEL, CORY M. HIMSEL,)
CLINTON S. HIMSEL, 4/9 LIVESTOCK, LLC,)
and CO-ALLIANCE, LLP,)

Defendants.)
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AFFIDAVIT OF MARK CHERNAIK, PH.D

I, MARK CHERNAIK, declare under penalty of perjury as follows:

Kim Ferraro, attorney with the Hoosier Environmental Council, a non-profit environmental organization representing Plaintiffs in this case, asked me to address the following questions regarding the above-referenced matter:

- 1) whether the complaints of Martin Richard and Janet L. Himsel (Himsels) and Robert and Susan Lannon (Lannons) about noxious odors on their properties located at 3581 West 350 North, in Danville, Indiana, and 3868 West 350 North in Danville, Indiana, are due to the operation of a concentrated animal feeding operation (the CAFO) located at 3042 North 425 West, in Danville, Indiana; and
- 2) whether chemicals with noxious odors emitted by the CAFO have traveled onto the Himsels' and Lannons' properties; and, if so, whether this is an expected result considering the nature of operations at the CAFO in proximity to the Himsels' and Lannons' properties.

I. Professional Qualifications

I am qualified to answer these questions. In 1990, I earned a Ph.D. in biochemistry from Johns Hopkins University School of Public Health, in Baltimore, Maryland. My doctoral studies and research focused on the intersection of molecular biology and environmental toxicology. In 1993, I earned a degree in law from the University of Oregon School of Law, Eugene, Oregon, with a focus on environmental law. Since 1993, I have served as

Staff Scientist for the U.S. Office of the Environmental Law Alliance Worldwide. In this capacity, I provide scientific information and analysis to public interest attorneys in more than 60 countries.

In June 2005, and again in February 2011, the European Court of Human Rights relied extensively on my work to reach landmark decisions (*Fadeyeva v. Russia*; *Dubetska v. Ukraine*) regarding the rights of individuals exposed to toxic substances. [Citation: *Fadeyeva v. Russia* 55723/00 [2005] ECHR 376 (9 June 2005); *Dubetska v. Ukraine* 30499/03 [2011] ECHR (10 February 2011)]. My opinions on environmental matters have been cited favorably in judgments of the Supreme Court of India, the Supreme Court of Pakistan, and the Supreme Court of Belize. [Citation: *M.C. Mehta v. Union of India*, 1999-(003)-CLJ 0361-SC; *Shehla Zia v. WAPDA*, PLD 1994 (SC) 693; *Belize Institute for Environmental Law (BELPO) v. Department of Environment (DOE)*, Supreme Court of Belize (30 June 2008) (Claim No. 302 OF 2007)].

In 2011, the United States District Court for the Northern District of Indiana accepted my expert opinions in support of a motion for class certification on the cause and effects of exposure on the surround community to air pollution from an industrial waste processing facility. The court granted class certification in that case relying on my testimony and awarded damages of more than \$50 million to the plaintiff class based in part on my expert testimony about the health effects caused by defendants' releases of toxic substances. In 2011 and 2012, the Superior Court of California, Alameda County accepted my expert written testimony, and in court, on the impacts to air quality of industrial pollution (principally manganese) from Pacific Steel Casting in the City of Berkeley. A jury awarded a verdict for plaintiffs with award of nominal damages.

A major focus of my work is the protection of air quality through community-based air quality monitoring projects. I have worked on the design of air quality monitoring projects, and interpretation of air quality data in dozens of projects throughout the United States and additional projects throughout the world.

Please see my attached C.V. for further details.

II. Documents and Information Reviewed

In preparing this report, I examined the following documents:

- American Society of Agricultural and Biological Engineers (April 2012) Management of Manure Odors, Standard EP379.5
- Hendricks County Area Plan Commission (March 12, 2013) Partial Transcript, Zoning Amendment Application Hearing, ZA 418/13
- 4/9 Livestock LLC (April 16, 2013) Confined Feeding Approval Application

- Indiana Department of Environmental Management (May 31, 2013) Approval Decision
- Indiana Department of Environmental Management (December 15, 2014) CFO Inspection Report
- Sure-Tech Lab (April 14, 2016) Lab Analysis of Liquid Manure, 4/9 Livestock LLC
- Ag-Odor Control (Undated) MOC-7 Manure Pit Treatment
- 4/9 Livestock LLC (Various dates) Confined Feeding Operation (CFO) Manure Application Record
- Daily Observation Reports of the Himsels and Lannons

III. Scientific Studies Reviewed

In preparing this report, I examined the following scientific studies

- Schiffman, S. S., Miller, E. A. S., Suggs, M. S., & Graham, B. G. (1995). The effect of environmental odors emanating from commercial swine operations on the mood of nearby residents. *Brain research bulletin*, 37(4), 369-375;
- Zahn, J. A., DiSpirito, A. A., Do, Y. S., Brooks, B. E., Cooper, E. E., & Hatfield, J. L. (2001). Correlation of human olfactory responses to airborne concentrations of malodorous volatile organic compounds emitted from swine effluent. *Journal of Environmental Quality*, 30(2), 624-634;
- Schiffman, S. S., Bennett, J. L., & Raymer, J. H. (2001). Quantification of odors and odorants from swine operations in *North Carolina*. *Agricultural and Forest Meteorology*, 108(3), 213-240;
- Miller, G. Y., Maghirang, R. G., Riskowski, G. L., Heber, A. J., Robert, M. J., & Muyot, M. E. (2004). Influences on air quality and odor from mechanically ventilated swine finishing buildings in *Illinois Journal of Food and Agriculture and Environment* 2, 353-360;
- Bunton, B., O'Shaughnessy, P., Fitzsimmons, S., Gering, J., Hoff, S., Lyngbye, M., ... & Werner, M. (2007). Monitoring and modeling of emissions from concentrated animal feeding operations: overview of methods. *Environmental health perspectives*, 303-307;

- Wing, S., Horton, R. A., Marshall, S. W., Thu, K., Tajik, M., Schinasi, L., & Schiffman, S. S. (2008). Air pollution and odor in communities near industrial swine operations. *Environmental health perspectives*, 116(10), 1362.

IV. Air Study Design

To determine whether noxious levels of odorants emitted by swine feedlots are on the properties of the Himsels and Lannons, I designed a project to measure levels of odorous chemicals on their properties. I began by reviewing the scientific literature identified above about noxious odors from swine operations to identify: 1) which chemicals contribute most to noxious odors from these facilities; and 2) which are the most reliable methods that on a practical basis could be employed to quantify the levels of these chemicals on the Himsels' and Lannons' properties.

Industrial swine operations generate several classes of gases, as illustrated in Table 1 below, from a standard developed by the American Society of Agricultural and Biological Engineers.¹

Table 1 – Typical compounds resulting from the anaerobic decomposition of animal manure

Volatile Fatty Acids Acetic Propionic Butyric Isobutyric Isovaleric	Sulfides Hydrogen sulfide Dimethylsulfide Diethylsulfide Disulfides
Alcohols	Ammonia and Amines Ammonia Methylamine Ethylamine Dimethylamine Trimethylamine Diethylamine
Aldehydes	
Esters	
Phenols and Cresols Phenol p-Ethyl-phenol p-Cresol	
Mercaptans Methymercaptan Ethylmercaptan Propylmercaptan	Nitrogen Heterocycles Indole Skatole
	Odorless Gases Carbon Dioxide Methane

¹ American Society of Agricultural and Biological Engineers (April 2012) Management of Manure Odors, Standard EP379.5

Although gases emitted by concentrated swine operations are heterogeneous, the scientific literature indicates that a relatively small number of individual chemicals contribute to the overall noxiousness of air in the vicinity of these facilities. The major odorants are primarily *volatile fatty acids, phenols and cresols, sulfides and mercaptans, ammonia, amines, and nitrogen heterocycles*.

Of the chemicals in the chart above, I designed testing methods for: 1) volatile fatty acids; 2) ammonia; 3) sulfides and mercaptans; and 4) amines.

Measuring levels of *volatile fatty acids* on the Himsels' and Lannons' properties consisted of passing 100 liters of air (at a rate of 1 liter/minute by use a portable pump) on a commercially available sorbent tube with a high-affinity for volatile fatty acids. The sorbent tubes were shipped to a commercial laboratory (ALS in Simi Valley, California) where volatile fatty acids were desorbed and quantified by combined gas chromatography/mass spectrometry (GC/MS).

Measuring levels of *ammonia* consisted of setting out for a measured period of time commercially available passive samplers containing a sorbent with a high-affinity for ammonia,² and then shipping the samplers to a commercial laboratory (Gradko Environmental, Winchester, United Kingdom) where ammonia was desorbed from the samplers and quantified by ion chromatography.

Measuring levels of *sulfides and mercaptans* on the Himsels' and Lannons' properties consisted of collecting 1 liter of air in an evacuated stainless steel canister (Summa canister). The filled canisters were shipped to a commercial laboratory (ALS, Simi Valley, California) where mercaptans and sulfides in the canister were quantified by a gas chromatograph equipped with a sulfur chemiluminescence detector (SCD).

Measuring levels of *amines* consisted of passing 100 liters of air (at a rate of 1 liter/minute by use a portable pump) on a commercially available sorbent tube with a high-affinity for amines. The sorbent tubes were shipped to a commercial laboratory (ALS, Simi Valley, California) where amines were desorbed and quantified by combined gas chromatography/mass spectrometry (GC/MS).

I was not able to include all possible classes of chemicals with noxious odors that might be occurring on the Himsels' and Lannons' properties within the project design. For example, there are no commercially-available methods for measuring *nitrogen heterocycles*, including *indole and skatole*, so my design did not include these even though indole and skatole, which are present in feces, are known to contribute a substantial portion to the noxiousness of odors from concentrated swine feedlot operations. Also, there are also no commercially-available methods for measuring

² The DIFRAM-400 – Rapid Air Monitor for Ammonia sold by Ormantine, USA Ltd. Inc. <http://www.ormantineusa.com/ammonia-ram>

phenols and cresols, so my design did not include these even though certain phenols and cresols, such as 4-methyl phenol, are known to contribute a significant portion to the noxiousness of odors from concentrated swine feedlot operations. I chose not to include testing for *alcohols and esters* in the design of the project because these two classes of compounds have odors that are not potentially offensive except for very high concentrations. I chose not to include testing for *aldehydes* because there is a lack of strong evidence in the scientific literature that this class of compounds contributes a substantial portion to the noxiousness of odors from concentrated swine feedlot operations.

I trained the Himsels and the Lannons to collect air samples from their properties. The training took place on Saturday, June 11th, from approximately 9:00 a.m. to 6:00 p.m. and focused on the use of a pump³ and an air flow calibrator⁴ for the purpose of passing a measured volume of air through sorbent tubes for the capture of volatile fatty acids and amines. The training also included how to open and close Summa canisters for collecting air samples that were analyzed for levels and sulfides and mercaptans, and how to set out passive samplers for collecting air samples that were analyzed for levels of ammonia.

The training also focused on how to properly fill out Chain-of-Custody forms that accompany samples when shipped to analytical laboratories and include contemporaneous observations of field conditions. The training was ‘hands-on’ in that the Himsels and Lannons received instruction until they could demonstrate, on their own, consistently successful use of the equipment and supplies for the collection of mock samples.

The sample collection methods the Himsels and Lannons used to collect air samples from their properties have been verified in the scientific literature to be reliable methods as follows:

- The commercially available pump and air flow calibrator used by the Himsels and Lannons for passing a measured volume of air through sorbent tubes have been relied upon for air sample collection in peer-reviewed studies on air quality in agricultural and occupational settings.⁵

³ The AirChek ® XR5000 Sample Pump rented from SKC Inc.

<http://www.skccinc.com/catalog/pdf/instructions/38047.pdf>

⁴ The 4146 Calibrator Kit rented from SKC Inc.

http://www.skccinc.com/catalog/product_info.php?products_id=2360

⁵ Jerez, S. B., Cheng, Y., & Bray, J. (2014). Exposure of workers to dust and bioaerosol on a poultry farm. *The Journal of Applied Poultry Research*, 23(1), 7-14; Kim, B., Yoon, J. H., Choi, B. S., & Shin, Y. C. (2013). Exposure assessment suggests exposure to lung cancer carcinogens in a painter working in an automobile bumper shop. *Safety and health at work*, 4(4), 216-220.

- The commercially available sorbent tubes used by the Himsels and Lannons for capturing volatile fatty acids and amines in pumped air samples have been relied on by peer-reviewed studies on air quality in agricultural settings.⁶
- The commercially available passive samplers containing a sorbent with a high-affinity for ammonia used by the Himsels and Lannons have been relied upon for air sample collection in peer-reviewed air quality studies in agricultural settings.⁷
- The commercially-available Summa canisters used by the Himsels and Lannons for collecting samples analyzed for sulfides and mercaptans have been relied on in hundreds of peer-reviewed air quality studies over the last 30 years.⁸
- Combined gas chromatography/mass spectrometry (GC/MS) used for the measurement of volatile fatty acids and amines in pumped air samples is the basis of numerous standard methods of the U.S. Environmental Protection Agency.⁹ GC/MS is considered to the 'gold standard' of all analytical methods.¹⁰

6 Parker, D. B., Buser, Z., Caraway, E., Rhoades, M., Olsen, M., Casey, K., ... & Green, G. (2007, September). VOC concentrations downwind of beef feedlots during intense odour events. In *Proceedings of the 14th IUAPPA World Congress* (pp. 9-13). Koziel, Jacek A., Jarett P. Spinhirne, Jenny D. Lloyd, David B. Parker, Donald W. Wright, and Fred W. Kuhrt. "Evaluation of sample recovery of malodorous livestock gases from air sampling bags, solid-phase microextraction fibers, Tenax TA sorbent tubes, and sampling canisters." *Journal of the Air & Waste Management Association* 55, no. 8 (2005):

7 D'Ann, L. W., Breyse, P. N., McCormack, M. C., Diette, G. B., McKenzie, S., & Geyh, A. S. (2011). Airborne cow allergen, ammonia and particulate matter at homes vary with distance to industrial scale dairy operations: an exposure assessment.

Environmental Health, 10(1), 1.; Wilson, S. M., & Serre, M. L. (2007). Use of passive samplers to measure atmospheric ammonia levels in a high-density industrial hog farm area of eastern North Carolina. *Atmospheric Environment*, 41(28), 6074-6086.

8 Oliver, K. D., Pleil, J. D., & McClenny, W. A. (1986). Sample integrity of trace level volatile organic compounds in ambient air stored in SUMMA® polished canisters. *Atmospheric Environment* (1967), 20(7), 1403-1411; Brymer, D. A., Ogle, L. D., Jones, C. J., & Lewis, D. L. (1995). Viability of using SUMMA polished canisters for the collection and storage of parts per billion by volume level volatile organics. *Environmental science & technology*, 30(1), 188-195.

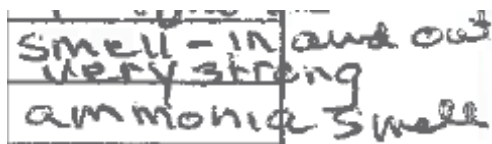
9 U.S. EPA method 8260C: Volatile organic compounds by gas chromatography/mass spectrometry (GC/MS). <https://www.epa.gov/sites/production/files/2015-12/documents/8260c.pdf>

10 Krone, N., Hughes, B. A., Lavery, G. G., Stewart, P. M., Arlt, W., & Shackleton, C. H. (2010). Gas chromatography/mass spectrometry (GC/MS) remains a pre-eminent discovery tool in clinical steroid investigations even in the era of fast liquid chromatography tandem mass spectrometry (LC/MS/MS). *The Journal of steroid biochemistry and molecular biology*, 121(3), 496-504.

- Ion chromatography used for the measurement of ammonia in passive air samples is the standard method for determining ammonia in the Manual of Analytical Methods of the National Institute of Occupation Safety and Health.¹¹
- A gas chromatograph equipped with a sulfur chemiluminescence detector used for the measurement of sulfides and mercaptans in air samples collected in Summa canisters is the method relied up by regulatory agencies.¹²

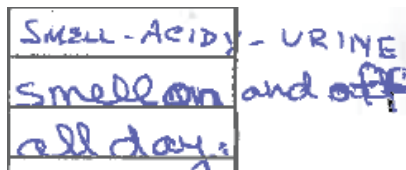
V. RESULTS: VOLATILE FATTY ACIDS

On June 20th, 2016, from 10:10 a.m. to 11:50 a.m., an air sample was collected on the Himsels' property on the patio to the south side of the home, approximately 510 meters (555 yards) east-northeast (ENE) of the eastern sides of barns of the CAFO. During the collection of the sample, winds were recorded to be from the south-southwest (SSW) direction at a speed of 10-15 miles per hour (mph) and weather was recorded to be partly sunny with a temperature between 79° F and 82° F. Susan Lannon, who collected the sample, recorded the following observation:



Smell - in and out
very strong
ammonia smell

On June 30th, 2016, from 5:55 p.m. to 7:35 p.m., an air sample was collected on the property of Robert and Susan Lannon, in the front yard of the home, approximately 1010 meters (1100 yards) northeast (NE) of the eastern sides of barns of the CAFO operated by 4/9 Livestock, LLC. During the collection of the sample, winds were recorded to be from the southwest (SW) direction at a speed of 3-8 mph and weather was recorded to be sunny with a temperature of 80° F. Susan Lannon, who collected the sample, recorded the following observation:



Smell - Acidic - URINE
smell on and off
all day

¹¹ Method 6016: Ammonia by IC <https://www.cdc.gov/niosh/docs/2003-154/pdfs/6016.pdf>

¹² Bay Area Air Quality Management District Method 44A: Determination of reduced sulfur gases and sulfur dioxide in a gaseous matrix using the sulfur chemiluminescence detector. <http://www.baaqmd.gov/~media/files/records/mop/vol-3/mop-44a.pdf?la=en>

On August 13th and 14th, 2016, Field Blanks were collected at identical locations at both properties. The Field Blank collected on the property of Robert and Susan Lannon was collected at 9:15 a.m. on August 13th, 2016. During the collection of the sample, winds were recorded to be from the southwest (SW) direction at a speed of 3 mph and weather was recorded to be raining with 93% humidity. Susan Lannon, who collected the sample, recorded the following observation:

Wet
fecal smell

The Field Blank collected on the property of Martin Richard and Janet L. Himsel was collected at 7:15 a.m. on August 14th, 2016. During the collection of the sample, winds were recorded to be calm and weather was recorded to be mostly cloudy with 94% humidity and rain in the forecast. Susan Lannon, who collected the sample, recorded the following observation:

Strong
manure smell

For the air sample collected on the Himsels' property on June 20th, 2016, the following levels of volatile fatty acids were detected: **acetic acid, 24 parts per billion (ppb); propionic acid, 4.7 ppb; butanoic acid, 1.3 ppb; pentanoic acid, 2.4 ppb; hexanoic acid, 15 ppb; heptanoic acid, 1.2 ppb; octanoic acid, 2.6 ppb; and nonanoic acid, 1.3 ppb.**

For the air sample collected on the Lannons' property on June 30th, 2016, the following levels of volatile fatty acids were detected: **acetic acid, 37 ppb; propionic acid, 2.5 ppb; butanoic acid, 1.0 ppb; pentanoic acid, 1.3 ppb; hexanoic acid, 7.2 ppb; heptanoic acid, 2.9 ppb; octanoic acid, 9.1 ppb; and nonanoic acid, 1.8 ppb.**

All levels of volatile fatty acids in the Field Blanks collected on August 13th and 14th, 2016, were below method detection limits.

A. Comparison to levels of volatile fatty acids typically found in outdoor air

Levels of volatile fatty acids typically found in outdoor air are orders of magnitude lower compared to the levels of volatile fatty acids found on Himsels' and Lannons' properties.

For example, for hexanoic acid, according to the National Library of Medicine's TOXNET toxicology data network.¹³

¹³ <https://toxnet.nlm.nih.gov/cgi-bin/sis/search/a?dbs+hsdb:@term+@DOCNO+6813>

“Atmospheric Concentrations:

“URBAN/SUBURBAN: Mean atmospheric concns of 0.006-0.063 ppb hexanoic acid were detected in ambient air samples collected in Los Angeles, CA in Jul and Sep 1984(1). Hexanoic acid was detected in the indoor air of manufactured homes at levels of 0.3-5.5 ppb (geometric mean = 1.2 ppb) and newly constructed homes at levels of 0.5-2.0 ppb (geometric mean = 1.0 ppb)(2). Hexanoic acid was detected in the air of Southern California in October 1984 at levels of 0.004-0.027 ppb(3). The average concn of hexanoic acid in the air of Long Beach, Los Angeles, Azusa, and Claremont, CA was 0.32, 0.48, 0.52, and 0.27 ug/cu m, respectively during a photochemical smog event in the summer of 1993(4). [(1) Kawamura K et al; Environ Sci Technol 19: 1082-6 (1985) (2) Hodgson AT et al; Indoor Air 10: 178-192 (2000) (3) Kawamura K et al; Atmos Environ 34: 4175-4191 (2000) (4) Nolte CG et al; Environ Sci Technol 35: 540-545 (1999)]

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“RURAL/REMOTE: The concentration at a background remote location (San Nicolas Island, off the southwest coast of California) was measured as 0.02 ug/cu m(1). [(1) Nolte CG et al; Environ Sci Technol 35: 540-545 (1999)] **PEER REVIEWED**

Similarly, for octanoic acid, according to the National Library of Medicine’s TOXNET toxicology data network.¹⁴

“URBAN/SUBURBAN: Octanoic acid was identified in air samples collected along the Niagara River in Sept 1982 at an unreported concn(1). Air samples collected in Los Angeles between July and Sept 1984 contained 0.002 to 0.021 ppb octanoic acid(2). Octanoic acid was detected at 0.08, 0.10, 0.12 and 0.08 ug/cu m in Long Beach, Los Angeles, Azusa and Claremont, CA, respectively, Sept 8-9, 1993(3). Octanoic acid was found at 0.002-0.012, 0.002-0.007, 0.011-0.015, and 0.009-0.025 ppbv at UCLA campus, Newberry Park, Monterey Park, and La Habra, CA in Oct 1984(4). Octanoic acid had an average concentration of 2.4 ng/cu m in 4 urban sites from southern CA from samples taken Sept 8-9, 1993(5).

[(1) Hoff RM, Chan K; Environ Sci Technol 21: 556-61 (1987) (2) Kawamura K et al; Environ Sci Technol 19: 1082-6 (1985) (3) Nolte CG et al; Environ Sci Technol 33: 540-5 (1999) (4) Kawamura K et al; Atmos Environ 34: 4175-91 (2000) (5) Fraser MP et al; Environ Sci Technol 37: 446-53 (2003)] **PEER REVIEWED**

“RURAL/REMOTE: Octanoic acid was found in 20% of samples taken near a lighthouse in Fajardo and was also detected in the open ocean off the south coast of Puerto Rico(1). Octanoic acid was not detected on San Nicolas Island, CA Sept 8-9, 1993(2). Remote aerosol samples collected from the North Pacific Ocean and

¹⁴ <https://toxnet.nlm.nih.gov/cgi-bin/sis/search2/f?./temp/~AHC6B6:1>

heavily vegetated areas of American Samoa contained an octanoic acid concn of 0.018 ng/cu m and 2.1 ng/cu m, respectively(3).

[(1) Mayol-Bracero OL et al; Atmos Environ 35: 1735-45 (2001) (2) Nolte CG et al; Environ Sci Technol 33: 540-5 (1999) (3) Kawamura K, Gagosian RB; Nature 325: 330-1 (1987)] **PEER REVIEWED**”

B. Significance of the levels of volatile fatty acids found on the Himsels’ and Lannons’ properties

In 2010, scientists with the UCSD and University College London, published a study on how humans perceive volatile fatty acids in ambient air.¹⁵ The scientists noted: “From an environmental perspective, carboxylic acids play an important role in the generation of odor pollution in a variety of environments.” Using an air dilution olfactometer the scientists measured the responsiveness of 33 young, healthy, non-smoking subjects to varying concentrations of volatile fatty acids, alone or in combination and found the following odor thresholds (ODTs) for volatile fatty acids that were found of the Himsels’ and Lannons’ properties.

15 Cometto-Muñiz, J., & Abraham, M. (2010). Structure–activity relationships on the odor detectability of homologous carboxylic acids by humans. *Experimental brain research*, 207(1-2), 75-84.

Table 2 Quantification of the parameters from the group psychometric function for each acid, considering all subjects (upper part) and only the common subjects tested with all five odorants (lower part)

	<i>n</i>	ODT (ppb)	C (log ppb)	SE (C)	D	SE (D)	<i>R</i> ²
All subjects							
Formic acid	18	514	2.711	0.062	0.30	0.06	0.954
Acetic acid	16	5.2	0.716	0.021	0.25	0.02	0.994
Butyric acid	14	0.26	−0.584	0.019	0.16	0.02	0.994
Hexanoic acid	18	1.0	0.008	0.023	0.22	0.02	0.993
Octanoic acid	14	0.86	−0.066	0.026	0.20	0.02	0.990
Common subjects							
Formic acid	3	485	2.686	0.072	0.16	0.06	0.909
Acetic acid	3	5.7	0.759	0.045	0.18	0.04	0.970
Butyric acid	3	0.23	−0.630	0.035	0.09	0.02	0.976
Hexanoic acid	3	1.1	0.024	0.036	0.17	0.03	0.979
Octanoic acid	3	1.1	0.042	0.038	0.20	0.03	0.981

Columns show number of subjects (*n*), ODT (in ppb), parameters C (log of ODT) and D (function steepness) with their respective standard error (SE), and goodness of fit (*R*²)

Earlier, in 2007, scientists with the Monell Chemical Senses Center, the Flavor System & Technology Laboratory, and the University of Pennsylvania School of Medicine examined human responsiveness to mixtures of individual volatile fatty acids to determine whether mixtures elicit an additive response.¹⁶ These scientists found:

“Additivity of detectability was assessed with respect to response addition (independent processing of mixture components). For C2 [acetic acid]+ C6 [hexanoic acid], for which the mixture components differed by 4 methylene units, and C2 [acetic acid] + C8 [octanoic acid], which differed by 6 methylene units, *response addition provided a reasonably good description of detection at all levels of performance*. In contrast, for C2 [acetic acid] + C4 [butyric acid], which differed by only 2 methylene units, detection showed a tendency to exceed additivity at low concentrations but fell below additivity at higher concentrations.”

¹⁶ Wise, P. M., Miyazawa, T., Gallagher, M., & Preti, G. (2007). Human odor detection of homologous carboxylic acids and their binary mixtures. *Chemical senses*, 32(5), 475-482.

Therefore, responsiveness to the mixtures of volatile fatty acids found on the Himsels' and Lannons' properties should be assumed to elicit an additive response to humans on the properties. Applying this assumption to levels of volatile fatty acids found on the Himsels' and Lannons' properties shows the mixtures of C2, C4, C6 and C8 volatile fatty acids found on those properties exceed human odor thresholds for these substances by roughly 28-fold on both properties.

Volatile Fatty Acid levels at Clients Property, parts per billion (ppb)

	Acetic Acid (C2)	Butyric Acid (C4)	Hexanoic Acid (C6)	Octanoic Acid (C8)	
Himsel Property, 20 June	24.0	1.3	15.0	2.6	
Lannon Property, 30 June	37.0	1.0	7.2	9.1	
Odor Threshold[FN1]	5.2	0.26	1	0.86	Cumulative exceedance of odor threshold assuming additivity [FN2]
Multiple of odor threshold, %					
	Acetic Acid (C2)	Butyric Acid (C4)	Hexanoic Acid (C6)	Octanoic Acid (C8)	
Himsel Property, 20 June	462%	500%	1500%	302%	2764%
Lannon Property, 30 June	712%	385%	720%	1058%	2874%

Odor Threshold = reliable detection of odor by 50% of healthy, non-smoking subjects, 5-second controlled exposure

FN1: Cometto-Muñiz, J. E., & Abraham, M. H. (2010). Structure–activity relationships on the odor detectability of homologous carboxylic acids by humans. *Experimental brain research*, 207(1-2), 75-84.

FN2: Wise, P. M., Miyazawa, T., Gallagher, M., & Preti, G. (2007). Human odor detection of homologous carboxylic acids and their binary mixtures. *Chemical senses*, 32(5), 475-482

The odors associated with exposure to of C2, C4, C6 and C8 volatile fatty acids have been described as 'sour,' 'pungent,' 'fecal,' 'stench,' and 'rancid.'¹⁷ There is an evolutionary basis for how volatile fatty acids are perceived. Since rotting organic matter, including vomit, is the source of volatile fatty acids, the olfactory systems have evolved to be repulsed by volatile fatty acids as an avoidance mechanism against pathogens in rotting material.

The presence on the Himsels' and Lannons' properties of C2, C4, C6 and C8 volatile fatty acids at roughly 28-times their odor threshold on an additive basis, combined with contemporaneously recorded observations of odor intensity, demonstrates that the Himsels and Lannons are exposed to noxious levels of volatile fatty acids.

The presence of C3 (propionic acid), C5 (pentanoic acid) and C7 (heptanoic acid) at levels above 1 ppb on the Himsels' and Lannons' properties would further add to the intensity of noxiousness associated with exposure to of C2, C4, C6 and C8 volatile fatty acids discussed above.

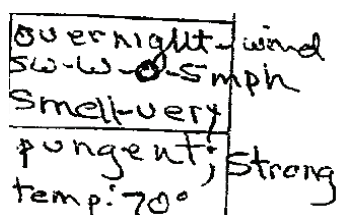
Because samples were collected over a 100-minute period, levels of volatile fatty acids measured in the samples are *average levels* over the 100-minute period. Because levels

¹⁷ Goldstein, N. (2002). Getting to know the odor compounds. *Biocycle*, 43(7), 42-44.

of gases in ambient air emitted by fugitive sources fluctuate over time (for example, due to variable winds), then the Himsels' and Lannons' properties would have experienced peak levels of volatile fatty acids higher than the average levels that are reported. Field blanks were collected by cutting open and immediately capping sorbent tubes from the Himsels' and Lannons' properties. No ambient air was pumped through the tubes. The absence of detectable levels of volatile fatty acids in the Field Blanks rules out the possibility that volatile fatty acids detected in the pumped air samples are spurious results associated with a defect in the sorbent tubes or how they were handled.

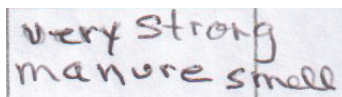
VI. RESULTS: AMMONIA

On June 11th-12th, 2016, from 9:30 a.m. to 9:30 a.m., an air sample was collected on the Himsels' property, on the patio to the south side of the home. During the collection of the sample, winds were recorded to be from the southwest (SW) direction at a speed of 10-15 miles per hour (mph) and weather was recorded to be partly sunny with a temperature between 70° F and 92° F. Susan Lannon, who collected the sample, recorded the following observation:



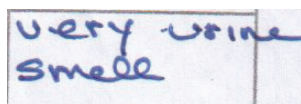
Overnight wind
SW-W 10-15 mph
Smell-very
pungent; Strong
temp: 70°

On June 20th, 2016, from 9:50 a.m. to 9:50 p.m., a second air sample was collected on the Himsels' property, on the patio to the south side of the home. During the collection of the sample, winds were recorded to be from the southwest (SW) direction at a speed of 10-15 miles per hour (mph) and weather was recorded to be partly sunny with a temperature between 79° F and 91° F. Susan Lannon, who collected the sample, recorded the following observation:



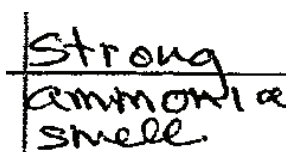
very strong
manure smell

On June 26th, 2016, from 9:45 a.m. to 7:15 p.m., an air sample was collected on the Lannons' property, in the front yard of the home. During the collection of the sample, winds were recorded to be from the southwest (SW) direction at a speed of 8-15 miles per hour (mph), calming around 7:00 p.m. and changing to the north as a storm was approaching. Susan Lannon, who collected the sample, recorded the following observation:



very urine
smell

On July 7th-8th, 2016, from 9:00 a.m. to 9:00 p.m., an air sample was collected on the Lannons' property, in the front yard of the home. During the collection of the sample, winds were recorded to be from the southwest (SW) direction at a speed of 5-10 miles per hour (mph), then changing to the west. Susan Lannon, who collected the sample, recorded the following observation:



Strong
ammonia
smell

For the air sample collected on the Himsels' property on June 11th-12th, 2016, the following level of ammonia was found: **70.6 parts per billion (ppb)**.

For the air sample collected on the Himsels' property on June 20th, 2016, the following level of ammonia was found: **93.4 ppb**.

For the air sample collected on the Lannons' property on June 26th, 2016, the following level of ammonia was found: **118.2 ppb**.

For the air sample collected on the Lannons' property on July 7th-8th, 2016, the following level of ammonia was found: **25.5 ppb**.

A. Comparison to levels of ammonia typically found in outdoor air

Levels of ammonia typically found in outdoor air are at least an order of magnitude lower compared to the levels of ammonia found on the Himsels' and Lannons' properties. According to the National Library of Medicine's TOXNET toxicology data network¹⁸:

“Atmospheric Concentrations:

In fall 1979, the concentration of gaseous ammonia in air samples taken at ground-level at urban Hampton and rural Langley, VA, ranged from 0.2-4.0 and from 1.5-4.0 ppb, respectively(1). Ammonia concentrations obtained in December 1979 on Long Island, NY, ranged from 80-200 nmol/cu m(1).

¹⁸ <https://toxnet.nlm.nih.gov/cgi-bin/sis/search2/f?./temp/~yj1BZG:1>

[(1) ATSDR; Toxicological Profile for Ammonia. Atlanta, GA: Agency for Toxic Substances and Disease Registry, US Public Health Service (2004)] **PEER REVIEWED**”

B. Significance of the levels of ammonia found on the Himsels’ and Lannons’ properties

The odor of ammonia is distinctly pungent and irritating and odor thresholds for ammonia cover a wide range, with some persons detecting ammonia only above 2500 ppb and some persons detecting ammonia at 40 ppb.¹⁹ Levels of ammonia on the Himsels’ property averaged 82 ppb, while levels of ammonia on the Lannons’ property averaged 71.9 ppb, which are levels above the level at which some persons detect ammonia.

Air sampling for ammonia at the Himsels’ property took place over a cumulative period of 32 hours, while air sampling for ammonia at the Lannons’ property took place over a cumulative period of 45.5 hours. Because levels of gases in ambient air emitted by fugitive sources fluctuate over time, and because the cumulative periods for collecting samples analyzed for ammonia were of such long duration, then the Himsels’ and Lannons’ properties would have experienced peak levels of ammonia substantially higher than the average levels that are reported.

VII. RESULTS: SULFIDES AND MERCAPTANS

On July 4th at 7:15 p.m. a 1-L sample of air was collected from the Himsels’ property in a Summa canister. During the collection of the sample, winds were recorded calm and the weather was recorded to be overcast with a temperature of 80° F. Susan Lannon, who collected the sample, recorded the following observation:

Smells like
hog shit.
F. P. Lannon

On July 5th at 6:30 p.m. a 1-L sample of air was collected from the Lannons’ property in a Summa canister. During the collection of the sample, winds were recorded as coming

¹⁹ Michaels, R. A. (1999). Emergency planning and the acute toxic potency of inhaled ammonia. *Environmental health perspectives*, 107(8), 617; van Thriel, C., Schäper, M., Kiesswetter, E., Kleinbeck, S., Juran, S., Blaszkewicz, M., ... & Brüning, T. (2006). From chemosensory thresholds to whole body exposures—experimental approaches evaluating chemosensory effects of chemicals. *International archives of occupational and environmental health*, 79(4), 308-321.

from the southwest direction (SW) at a speed of 5 mph, with a temperature of 89° F. Susan Lannon, who collected the sample, recorded the following observation:

PUNGENT

No detectable levels of sulfides and mercaptans were found in either sample.

In concentrated swine operations, carbon-based material in liquid manure is raw material for generation of volatile fatty acids; nitrogen-based material in liquid manure is the raw material for generation of ammonia; and sulfur-based material in liquid manure is the raw material for the generation of sulfides and mercaptans. In liquid manure, carbon-based material predominates, with smaller amounts of nitrogen and sulfur. Elemental analysis of liquid manure at the CAFO in question shows a sulfur content of 0.06% compared to a nitrogen content of 0.53%, which is a possible explanation for why ammonia, but not sulfides and mercaptans were detected on the Himsels' and Lannons' properties.

ANALYSIS	PERCENT (%)	LBS PER 1000 GAL	LBS/TON
TOTAL NITROGEN	0.53	44.22	10.60
NITROGEN FROM AMMONIA	0.36	30.03	7.20
PLANT AVAILABLE NITROGEN	0.44	36.71	8.80
PHOSPHORUS (P ₂ O ₅)	0.22	18.81	4.50
POTASSIUM (K ₂ O)	0.38	31.93	7.65
CALCIUM	0.12	10.83	2.59
MAGNESIUM	0.07	6.43	1.54
SODIUM	0.11	9.34	2.23
SULFUR	0.06	5.70	1.36

VIII. RESULTS: AMINES

On July 13th, 2016, from 12:00 p.m. to 1:40 p.m., an air sample was collected on the Lannons' property, in the front yard of the home. During the collection of the sample, winds were recorded to be from the south-southwest (SSW) direction at a speed of 1-5 miles per hour (mph). Susan Lannon, who collected the sample, recorded the following observation:

strong
ammonia small

On July 20th, 2016, from 6:30 p.m. to 8:10 p.m., a second air sample was collected on the Lannons' property, in the front yard of the home. During the collection of the sample,

winds were recorded to be from the southwest (SW) direction at a speed of 1-5 mph and weather was recorded to be partly cloudy with a temperature of 84° F. Susan Lannon, who collected the sample, recorded the following observation:

smell-strong
ammonia;
manure

On July 28th, from 6:20 p.m. to 8:00 p.m., an air sample was collected on the Himsels' property, on the patio to the south side of the home. During the collection of the sample, winds were recorded to be from the southwest (SW) direction at a speed of 3-7 mph and weather was recorded to be sunny with a temperature of 86° F. Susan Lannon, who collected the sample, recorded the following observation:

very strong
ammonia
nauseating

No detectable levels of amines were found in the three samples.

Trimethylamine is a major odorant emitted by concentrated swine operations. It is the chemical I targeted in deciding to test for levels of amines on the Himsels' and Lannons' properties. The reported odor threshold for trimethylamine is between 0.2 and 0.87 ppb.²⁰ The method reporting limit (MRL) for trimethylamine of the method used for measuring levels of amines on Himsels' and Lannons' properties is 4.2 ppb, significantly above the odor threshold for trimethylamine.

CAS #	Compound	Result µg/Tube	Result µg/m ³	MRL µg/m ³	Result ppbV	MRL ppbV
124-40-3	Dimethylamine	< 1.1	ND	11	ND	5.7
75-04-7	Ethylamine	< 1.1	ND	11	ND	5.8
75-50-3	Trimethylamine	< 1.0	ND	10	ND	4.2

Therefore, although no detectable levels of amines were found, the method cannot rule out the presence of odorous levels of trimethylamine on Himsels' and Lannons' properties.

IX. OCULAR AND OLFACTORY INSPECTION

²⁰ <https://hazmap.nlm.nih.gov/category-details?table=copytblagents&id=219>

On the day I trained the Himsels and Lannons to collect air samples (June 11th, 2016), I conducted an ocular and olfactory inspection of the *immediate vicinity* of Himsels' and Lannons' properties, and the *general surrounding* area of their properties.

With respect to the immediate vicinity of Himsels' and Lannons' properties, I began walking from the Himsels' property in a south-by-southwesterly direction through a soybean field towards the at-issue CAFO, stopping 60 yards from the eastern edge of the CAFO on North County Road 425 W. Throughout my inspection, winds were blowing from the southwest – that is from the CAFO and towards the Himsels' property. The intensity of the malodor I experienced in the immediate vicinity of the Himsels' and Lannons' properties consistently increased as I grew closer to the CAFO.

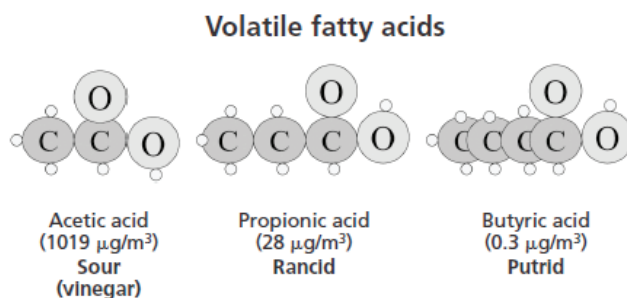
With respect to the general area surrounding the Himsels' and Lannons' properties, I rode slowly with the window down as a passenger in a vehicle over an area with a 3-mile radius surrounding the Himsels' and Lannons' properties. I requested that the vehicle stop at any area of significant interest, including lagoons and animal barns and sheds. At no other location during this inspection of the general surrounding area did I detect the malodor that I detected during my inspection of the immediate vicinity of Himsels' and Lannons' properties.

X. CONCLUSIONS

The evidence I gathered demonstrates that Himsels' and Lannons' complaints of noxious odors on their properties are proximately caused by the operation of the CAFO. Studies have characterized the identity of chemicals emitted by swine CAFOs that cause noxious odors. Two classes of chemicals with noxious odors – volatile fatty acids and ammonia – were found on the Himsels' and Lannons' properties at levels that can cause a noxious response at the same time the Himsels and Lannons observed experiencing noxious odors. The noxious odors that they observed were that same odors I observed over a gradient that continually increased when walking closer and closer to the CAFO.

The evidence I gathered demonstrates that chemicals with noxious odors emitted by the CAFO have traveled onto the Himsels' and Lannons' properties. Although gaseous and therefore invisible to the naked eye, as diagrammed below²¹, volatile fatty acids and ammonia found on the Himsels' and Lannons' properties at levels above their odor detection thresholds are *space-filling* compounds that were occupying a discrete portion of the Himsels' and Lannons' properties (see figure below).

²¹ Goldstein, N. (2002). Getting to know the odor compounds. *Biocycle*, 43(7), 42-44.



My examination of 34 Daily Observation Reports containing contemporaneous observations by the plaintiffs over the period of June 11th to November 2nd of 2016 of odors they experienced lead me to conclude that the entry onto plaintiffs properties of noxious chemicals emitted by defendants' CAFO is ongoing. The plaintiffs' observations are consistent with what I personally experienced when I visited the site on June 11th, 2016; these observations are consistent with continuing, unchanged operations at the CAFO.

In my professional opinion, the foregoing findings are expected given the nature of emissions that swine CAFOs are well-known to generate and the short distance upwind from the Himsels' and Lannons' properties where the Defendants chose to locate the CAFO.

I affirm, under the penalties for perjury, that the foregoing representation(s) are true.

14 December 2016
Date: _____

Mark Chernaik

Mark Chernaik, Ph.D.

MARK L. CHERNAIK

Science for Lawyers, Independent Consultant
Eugene, Oregon 97405
Tel: 541.513.1335
E-mail: mark@scienceforlawyers.com

EDUCATION

University of Oregon Law School, J.D., May 1993
Johns Hopkins University, Ph.D., Biochemistry, August 1990
University of Massachusetts, Amherst, B.S., Biochemistry, May 1984

WORK EXPERIENCE

Staff Scientist, Environmental Law Alliance Worldwide, U.S. (E-LAW U.S.), 1992-present

Helps more than four hundred public interest lawyers in more than sixty countries:

- obtain comprehensive and up-to-date scientific, technical, and medical information, publications, documents and analysis that are essential to the elements of a case
- present scientific information in concise terms that judges and other decision-makers can most easily understand
- critically evaluate the scientific and medical evidence presented by opposing parties
- identify and involve the best scientific and medical specialists
- critically evaluate Environmental Impact Assessments for proposed projects
- design, implement and interpret environmental testing projects

This assistance has led to numerous favorable judicial and administrative decisions, including:

- The European Court of Human Rights (*Fadeyeva v. Russia*) regarding the rights of individuals exposed to toxic substances.
- The Supreme Court of India (*M.C. Mehta v. Union of India*) regarding the operation of hazardous waste generating industries within the Delhi Metropolitan area
- The Supreme Court of Pakistan (*Zia v. WAPDA*) regarding the health effects of exposure to electromagnetic fields
- The Supreme Court of Bangladesh (*Bangladesh Environmental Lawyers Association v.*

Ministry of Housing and Public Works) regarding exclusion of development within flood plain zones

- The High Court of South Africa (*Earthlife Africa v. Department of Environmental Affairs and Tourism and others*) regarding the adequacy of the Environmental Impact Assessment of a proposed nuclear power plant
- The High Court of Nigeria (*Gbemre v. Shell Petroleum Development Corporation and others*) regarding the legality of gas flares at Niger River Delta oil fields
- The Supreme Court of Sri Lanka (*Lalanath M. de Silva v. Minister of Forestry and Environment*) regarding the necessity for establishing air pollutant emission standards.
- The High Court of Ipoh, Malaysia (*Chai Sing Chong v. Chip Lam Seng BHD*) regarding pollution abatement from a latex rubber processing factory.

Independent Consultant, Science for Lawyers, 2005-present

Helps public interest lawyers in the United States:

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- present scientific information in concise terms that judges and other decision-makers can most easily understand
- critically evaluate the scientific and medical evidence presented by opposing parties
- identify and involve the best scientific and medical specialists

In 2011, the United States District Court for the Northern District of Indiana accepted my written testimony on the health effects of exposure to industrial air pollution in support of a motion for class certification. Award of class certification was granted in January of 2013 noting my testimony. Available at: <http://www.bdlaw.com/assets/htmldocuments/Greene.pdf>. In December of 2015, the court awarded damages of more than \$50 million to plaintiffs based in large part on my expert testimony about the health effects caused by defendants' releases of toxic substances. <http://www.leagle.com/decision/In%20FDCO%2020151125D51/GREENE%20v.%20WILL>

In 2011 and 2012, the Superior Court of California, Alameda County accepted my written testimony, and my testimony in court, on the impacts to air quality of industrial pollution (principally manganese) from Pacific Steel Casting in the City of Berkeley. A jury awarded a verdict for plaintiffs with award of nominal damages. *Rosie Lee Evans, et al. v. Pacific Steel Casting Company, et al.* Archived video of my testimony is available. <http://cvn.com/witnesses/cher-naik-dr-mark-phd>

IN THE HENDRICKS COUNTY SUPERIOR COURT
DANVILLE, INDIANA
CAUSE NO. 32D04-1510-PL-150

The deposition upon oral examination of SAMUEL MOFFITT, a witness produced and sworn before me, Heather S. Orbaugh, a Notary Public, in and for the County of Boone, state of Indiana, taken on behalf of the Plaintiffs at the offices of Harrington Law, P.C., 105 North Washington Street, Danville, Hendricks County, Indiana on September 30, 2016 pursuant to the Applicable Rules of Procedure.

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<p style="text-align: right;">Page 2</p> <p>1 A P P E A R A N C E S</p> <p>2</p> <p>3 FOR ALL PLAINTIFFS:</p> <p>4 KIM E. FERRARO</p> <p>5 HOOSIER ENVIRONMENTAL COUNSEL</p> <p>6 407 EAST LINCOLNWAY</p> <p>7 SUITE A</p> <p>8 VALPARAISO, IN 46383</p> <p>9 (219) 464-0104 (PHONE)</p> <p>10 kferraro@hecweb.org</p> <p>11</p> <p>12 FOR ALL DEFENDANTS:</p> <p>13 CHRISTOPHER J. BRAUN</p> <p>14 PLEWS SHADLEY RACHER & BRAUN, LLP</p> <p>15 1346 NORTH DELAWARE STREET</p> <p>16 INDIANAPOLIS, IN 46202</p> <p>17 (317) 637-0711 (PHONE)</p> <p>18 cbraun@psrb.com</p> <p>19</p> <p>20 FOR THE DEFENDANT SAMUEL T. HIMSEL, Personally:</p> <p>21</p> <p>22 BRANDON W. EHRIE</p> <p>23 LEWIS WAGNER, LLP</p> <p>24 501 INDIANA AVENUE</p> <p>25 SUITE 200</p> <p> INDIANAPOLIS, IN 46202</p> <p> (317) 237-0500 (PHONE)</p> <p> behrie@lewiswagner.com</p>	<p style="text-align: right;">Page 4</p> <p>1 << CONFIDENTIAL / UNDER PROTECTIVE ORDER >></p> <p>2 I_N_D_E_X O_F E_X_H_I_B_I_T_S</p> <p>3 Deposition Exhibit No(s):</p> <p>4 **(Denotes exhibits marked in another deposition.)</p> <p>5 PAGES</p> <p>6 **16 - Co-Alliance Letter in Support of</p> <p>7 Request for Zoning Change dated</p> <p>8 02/05/13..... 89</p> <p>9 ** 19 - PQA Plus Certification Manual.... 214</p> <p>10 ** 20 - Pork Issues Handbook (1999/2000). 231</p> <p>11 ** 22 - Factsheet - Environmental for the</p> <p>12 Pork Industry..... 245</p> <p>13 ** 48 - 4/9 Livestock Performance Records</p> <p>14 On all Groups..... 106</p> <p>15 ** 50 - Letter from Indiana State Board</p> <p>16 Of Animal Health to Co-Alliance</p> <p>17 dated 11/21/14..... 122</p> <p>18 ** 53 - Farm World Article regarding Sam</p> <p>19 Moffitt..... 65</p> <p>20 63 - Co-Alliance Energy & Agribusiness</p> <p>21 Solutions brochure..... 92</p> <p>22 64 - Carroll County Agricultural Assn</p> <p>23 News, Information and Events about</p> <p>24 Agriculture in Carroll County</p> <p>25 (2008 Samuel D. Moffitt)..... 164</p> <p> 65 - 07-03-13 Letter from Sam Moffitt</p> <p> Regarding PQA Plus Certification.. 210</p> <p> 66 - National Pork Board through Pork</p> <p> Checkoff funds (Air Quality Issues) 220</p>
<p style="text-align: right;">Page 3</p> <p>1 I_N_D_E_X O_F E_X_A_M_I_N_A_T_I_O_N</p> <p>2 PAGES</p> <p>3</p> <p>4 DIRECT EXAMINATION..... 5</p> <p>5 QUESTIONS BY MS. KIM E. FERRARO</p> <p>6 DIRECT EXAMINATION (Continuing)..... 45</p> <p>7 QUESTIONS BY MS. KIM E. FERRARO</p> <p>8 DIRECT EXAMINATION (Continuing)..... 90</p> <p>9 QUESTIONS BY MS. KIM E. FERRARO</p> <p>10 DIRECT EXAMINATION (Continuing)..... 106</p> <p>11 QUESTIONS BY MS. KIM E. FERRARO</p> <p>12 DIRECT EXAMINATION (Continuing)..... 159</p> <p>13 QUESTIONS BY MS. KIM E. FERRARO</p> <p>14 DIRECT EXAMINATION (Continuing)..... 165</p> <p>15 QUESTIONS BY MS. KIM E. FERRARO</p> <p>16 DIRECT EXAMINATION (Continuing)..... 188</p> <p>17 QUESTIONS BY MS. KIM E. FERRARO</p> <p>18 DIRECT EXAMINATION (Continuing)..... 214</p> <p>19 QUESTIONS BY MS. KIM E. FERRARO</p> <p>20 DIRECT EXAMINATION (Continuing)..... 239</p> <p>21 QUESTIONS BY MS. KIM E. FERRARO</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 8:56 AM</p> <p>2 SEPTEMBER 30, 2016</p> <p>3 SAMUEL MOFFITT,</p> <p>4 Called upon by counsel for the Plaintiffs, was</p> <p>5 first duly sworn and then deposed as follows:</p> <p>6 DIRECT EXAMINATION</p> <p>7 BY MS. FERRARO:</p> <p>8 Q. Good morning, Mr. Moffitt. Could you state</p> <p>9 your full name for the record?</p> <p>10 A. Yes. Samuel Dale Moffitt.</p> <p>11 Q. Great. And we already talked about one,</p> <p>12 hearing potentially getting in the way, but do you</p> <p>13 anticipate any other problems in understanding my</p> <p>14 questions today?</p> <p>15 A. No.</p> <p>16 Q. Any problems related to health?</p> <p>17 A. No.</p> <p>18 Q. Other than your hearing?</p> <p>19 A. No.</p> <p>20 Q. Are you taking any medications that might</p> <p>21 impair your ability to understand my questions?</p> <p>22 A. No.</p> <p>23 Q. Lack of sleep?</p> <p>24 A. No.</p> <p>25 Q. No? Okay. Any mental distractions or</p>

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<p>1 Q. Okay. So we have covered a lot of ground from</p> <p>2 earlier their annual meetings, some conferences, and I</p> <p>3 am talking about the state organization right now.</p> <p>4 There is a newsletter?</p> <p>5 A. No.</p> <p>6 Q. No newsletter?</p> <p>7 A. No.</p> <p>8 Q. A magazine or a publication of any sort</p> <p>9 quarterly?</p> <p>10 A. Indiana Pork has a -- when the Pork Report</p> <p>11 comes out, the National Pork Report Magazine, we have</p> <p>12 a couple pages that they do state by state that's an</p> <p>13 insert that is specifically the Indiana producers that</p> <p>14 are in Checkoff, so that shows our picture at the</p> <p>15 state fair and the state fair ham breakfast and just</p> <p>16 some -- just some little informational activities or</p> <p>17 promotions.</p> <p>18 Q. That goes to the members?</p> <p>19 A. That goes to, yeah, the members that Checkoff.</p> <p>20 Q. And that was when you were head of the -- or</p> <p>21 the figurehead of the organization and that's what</p> <p>22 they did?</p> <p>23 A. I don't know how long they have been doing</p> <p>24 that. I think they decided to do that instead of</p> <p>25 spending and producing one ourselves that was limited.</p>	<p>1 A. Yes.</p> <p>2 Q. Does Co-Alliance have other staff members that</p> <p>3 have leadership positions with the Indiana Pork</p> <p>4 Producers Association?</p> <p>5 A. I don't -- I think maybe -- no, the guy I used</p> <p>6 to work with in Excel did some, but he no longer works</p> <p>7 for Co-Alliance. So, no, currently, although I think</p> <p>8 we do have a Michiana swine employee that is part of</p> <p>9 Co-Alliance now, I think he is becoming involved in</p> <p>10 that leadership program that I attended, the Pork</p> <p>11 Leadership Institute. So I think he just got in it</p> <p>12 less than three or four months ago.</p> <p>13 Q. I don't mean just currently, within the last I</p> <p>14 will pick ten years since you have -- almost ten years</p> <p>15 since you have been with Co-Alliance, are there</p> <p>16 other --</p> <p>17 A. Dewey and I are about the only ones left, I</p> <p>18 think, because we are old.</p> <p>19 Q. And let me finish my question. I am</p> <p>20 specifically asking right now about the Indiana Pork</p> <p>21 Producers Association?</p> <p>22 A. Yes. Not leadership. They might have been on</p> <p>23 a -- been asked to be on a committee, but I don't know</p> <p>24 specifically. But not leadership, no.</p> <p>25 Q. Same question for the National Pork Producers</p>
Page 183	Page 185
<p>1 Q. Pass on the Checkoff Report, that was</p> <p>2 something that has happened for awhile including back</p> <p>3 when you were involved?</p> <p>4 A. Yeah. At the time I was president, I think</p> <p>5 they had just kind of started the move to that because</p> <p>6 they were thinking are we putting all these out and</p> <p>7 who is reading them.</p> <p>8 Q. Okay. Did Co-Alliance know that you were</p> <p>9 selected to be president of the Indiana Pork Producers</p> <p>10 Association?</p> <p>11 A. Yes.</p> <p>12 Q. They were supportive of that?</p> <p>13 A. Yes.</p> <p>14 Q. Did Co-Alliance leadership know of your role</p> <p>15 with the National Pork Producers Council and the</p> <p>16 National Pork Board?</p> <p>17 A. Yes.</p> <p>18 Q. And they knew you had been a delegate for many</p> <p>19 years?</p> <p>20 A. Yes.</p> <p>21 Q. They were aware of your public or pork</p> <p>22 leadership initiative training in 2011-2012?</p> <p>23 A. Yes.</p> <p>24 Q. And they are supportive of your involvement in</p> <p>25 that?</p>	<p>1 Council and Pork Board?</p> <p>2 A. No, not that I am aware of.</p> <p>3 Q. Keith Berry wasn't president at one time?</p> <p>4 A. Oh, he is a board member. He is not on the</p> <p>5 swine staff so I forget about the board members.</p> <p>6 Yeah, so are you asking --</p> <p>7 Q. Yes.</p> <p>8 A. I thought you meant the swine staff.</p> <p>9 Q. Leadership -- that was a bad question on my</p> <p>10 part. The board and leadership?</p> <p>11 A. Yes, yes. Keith Berry was president of</p> <p>12 National Pork Producers Council. I'm not sure what</p> <p>13 time frame, but I see him at the various forums that</p> <p>14 we go to, they have a past president meeting and Keith</p> <p>15 did an awesome job.</p> <p>16 Q. Anyone else?</p> <p>17 A. Now that you said that -- I don't think -- I</p> <p>18 am trying to think who is all on the board now. Yes,</p> <p>19 I forgot about Keith. That's been years back. That's</p> <p>20 all I am aware of.</p> <p>21 Q. So I asked you earlier today about how you</p> <p>22 keep yourself educated on pork industry standards and</p> <p>23 information that you need to do your job; do you</p> <p>24 recall that line of questioning,</p> <p>25 A. Yes.</p>

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<p>1 Q. And was first called the Pork Quality</p> <p>2 Assurance Program and quickly became the pork</p> <p>3 industry's leading educational program; are you</p> <p>4 following me?</p> <p>5 A. Yes.</p> <p>6 Q. And then there is a time line at the bottom</p> <p>7 that illustrates that the current PQA Plus Program</p> <p>8 integrates aspects of other industry programs, and</p> <p>9 here I am reading, "providing producers with the most</p> <p>10 comprehensive food safety and animal care training</p> <p>11 available."</p> <p>12 A. Yes.</p> <p>13 Q. Looking down at the time line, I won't go back</p> <p>14 too far in history, but you were a pork producer in</p> <p>15 2001, correct?</p> <p>16 A. Yes.</p> <p>17 Q. Do you recall the TQA Program focusing on</p> <p>18 proper handling and transport of pigs?</p> <p>19 A. Yes, I actually certified for that but have</p> <p>20 since let it expire because I am not a trucker.</p> <p>21 Q. Okay. And then 2002 it talks about Florida</p> <p>22 voters approving a measure banning sow gestation</p> <p>23 stalls that became effective in 2008. Do you recall</p> <p>24 that event?</p> <p>25 A. Yes.</p>	<p>1 Q. And then in 2006 it talks about a web based</p> <p>2 tool was introduced to assist producers in air quality</p> <p>3 control issues; do you recall that?</p> <p>4 A. Vaguely, yes.</p> <p>5 Q. I'm not sure who put it together.</p> <p>6 Q. Well, all of these are National Pork Board</p> <p>7 sponsored initiatives.</p> <p>8 A. Right, but they may have asked some other</p> <p>9 sources, I am not sure if they -- who -- yes, they did</p> <p>10 do it.</p> <p>11 Q. You generally recall --</p> <p>12 A. Yes.</p> <p>13 Q. -- that initiative?</p> <p>14 A. Yes.</p> <p>15 (Exhibit 66 marked.)</p> <p>16 Q. I mentioned earlier that the National Pork</p> <p>17 Board has a website that has all sorts of resources</p> <p>18 available?</p> <p>19 A. Yes.</p> <p>20 Q. Do you recall that?</p> <p>21 A. Yes.</p> <p>22 Q. This is going back to the PQA Plus Program's</p> <p>23 mention of the web based tool that was launched in</p> <p>24 2006. That tool is available on the National Pork</p> <p>25 Board's website. If you turn to Page 3, I downloaded</p>
Page 219	Page 221
<p>1 Q. So then in response to that concern the</p> <p>2 Checkoff or it doesn't necessarily have to be in</p> <p>3 response, but the next bubble there on the time line</p> <p>4 in 2003 is the Checkoff's new Swap Program focusing on</p> <p>5 the care and welfare of animals. Do you recall that</p> <p>6 program?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Then in '04 Checkoff launched its</p> <p>9 Operation Main Street Program launched to help</p> <p>10 producers explain modern pork production; do you</p> <p>11 recall that one?</p> <p>12 A. Yes.</p> <p>13 Q. That is actually still around, right?</p> <p>14 A. Yes.</p> <p>15 Q. And then in '05 is the Take Care Program is</p> <p>16 released and provides producers guidelines for</p> <p>17 judicious use of antibiotics?</p> <p>18 A. Yes, that was an extension and more specific</p> <p>19 as part of the PQA Plus Program gets into that</p> <p>20 generally, but this took it on just a little bit</p> <p>21 further.</p> <p>22 Q. And all of those, fair to say, were addressing</p> <p>23 as we talked about, consumer concerns about animal</p> <p>24 welfare and use of antibiotics?</p> <p>25 A. Yes.</p>	<p>1 the page. It is the Air Quality Web Tool; do you see</p> <p>2 that?</p> <p>3 A. Okay.</p> <p>4 Q. In fact, the National Pork Board has not only</p> <p>5 information about the web tool, but on the second page</p> <p>6 information about the National Air Emissions</p> <p>7 Monitoring Study or something you said you had some</p> <p>8 knowledge about, correct?</p> <p>9 A. Yeah, they acknowledge, yes.</p> <p>10 Q. Going to the first page which is the main when</p> <p>11 you first go to the website, after you click on air</p> <p>12 quality, it says that, "The National Pork Board</p> <p>13 through Checkoff Funds is dedicated to providing</p> <p>14 information to US Pork Producers regarding odor and</p> <p>15 air quality issues." Were you aware that the National</p> <p>16 Pork Board had dedicated funds to providing</p> <p>17 information to US Pork Producers about odor and air</p> <p>18 quality issues?</p> <p>19 A. At the time, again, they do a lot of different</p> <p>20 projects so it was one, I don't know specifically that</p> <p>21 I was aware of it, but yeah, looking at different</p> <p>22 programs, I don't recall being specifically aware of</p> <p>23 this particular funding.</p> <p>24 Q. If you turn to the Page 3 about the air</p> <p>25 quality web tool we were talking about before, it</p>

<p style="text-align: right;">Page 246</p> <p>1 MR. BRAUN: Objection, the question has</p> <p>2 been asked and answered. The document speaks for</p> <p>3 itself. Subject to that, you can answer the question.</p> <p>4 A. I had not obtained any of them that I am aware</p> <p>5 of.</p> <p>6 Q. Is it fair to say that odors and air emissions</p> <p>7 are not important to pork producers in Indiana because</p> <p>8 they are not regulated?</p> <p>9 MR. BRAUN: Objection, the question</p> <p>10 calls for speculation and asks this witness to speak</p> <p>11 on behalf of all pork producers in Indiana. Subject</p> <p>12 to that if you know the answer, you are welcome to</p> <p>13 answer.</p> <p>14 A. I mean, yeah, I am not going to speak for</p> <p>15 everyone.</p> <p>16 Q. Well, for yourself, speak for yourself.</p> <p>17 A. I mean it is one of the issues that we have</p> <p>18 talked about for a long time and it is in other</p> <p>19 states, so it is an issue just as well as feed issues,</p> <p>20 welfare issues. We try to keep abreast of all the</p> <p>21 different areas. So it is one of the issues that we</p> <p>22 discuss.</p> <p>23 Q. Sure. But this one is not specifically</p> <p>24 regulated in Indiana as you mentioned earlier, right?</p> <p>25 A. Neither are a lot of the other issues.</p>	<p style="text-align: right;">Page 248</p> <p>1 A. Not until -- no, not until later and then</p> <p>2 through Dewey, it was the point person on it, and so</p> <p>3 that was -- I am not aware of --</p> <p>4 Q. Before the facility was built, back when the</p> <p>5 zoning issues were going on, were you aware of the</p> <p>6 community opposition to the 4/9 CAFO? And if you</p> <p>7 weren't, just say no.</p> <p>8 A. Other than Dewey may have mentioned that there</p> <p>9 are some, yeah, county issues with Hendricks County,</p> <p>10 so that's --</p> <p>11 Q. But not specifically about the community, the</p> <p>12 citizens, the neighbors?</p> <p>13 A. I had no idea who was involved, no.</p> <p>14 MS. FERRARO: That's all I have.</p> <p>15 MR. BRAUN: Do you have any questions?</p> <p>16 MR. EHRIE: No.</p> <p>17 MR. BRAUN: No questions. Read and</p> <p>18 sign. Thank you.</p> <p>19 (Proceedings adjourned at 6:02 p.m.)</p> <p>20</p> <p>21 AND FURTHER DEPONENT SAITH NOT</p> <p>22</p> <p>23</p> <p>24 (Signature of witness above</p> <p>25 Subject to any notations on</p> <p>Errata Sheet)</p>
<p style="text-align: right;">Page 247</p> <p>1 Q. Right. But they are required by your</p> <p>2 purchasers, the packers, right? Those other issues?</p> <p>3 A. The PQA Plus.</p> <p>4 Q. Right. That's required by the packers, right?</p> <p>5 A. Right.</p> <p>6 MR. BRAUN: Objection, the question has</p> <p>7 been asked and answered at least three times.</p> <p>8 Q. And so if this were a bottom line issue, odors</p> <p>9 and air quality issues, then it would be of importance</p> <p>10 to Co-Alliance, correct?</p> <p>11 MR. BRAUN: Objection, calls for</p> <p>12 speculation. Subject to that, if you could speak for</p> <p>13 Co-Alliance, you are welcome to answer the question.</p> <p>14 A. It's an issue that's out there and it is one</p> <p>15 of the many and we don't know which ones are going to</p> <p>16 be affecting the bottom line; it could be production,</p> <p>17 it could be environmental, it could be health, a lot</p> <p>18 of different areas.</p> <p>19 Q. Back when 4/9 was looking to construct the 4/9</p> <p>20 facility, so this would have been in 2013, did you</p> <p>21 have any communications with Cory, Clint, or Sam about</p> <p>22 the issues that were arising as a result of community</p> <p>23 concern?</p> <p>24 A. No.</p> <p>25 Q. You didn't know about it?</p>	<p style="text-align: right;">Page 249</p> <p>1 STATE OF INDIANA)</p> <p>2) Ss:</p> <p>3 COUNTY OF BOONE)</p> <p>4 I, Heather S. Orbaugh, the undersigned Court</p> <p>5 Reporter and Notary Public residing and maintaining</p> <p>6 offices in the City of Zionsville, Boone County,</p> <p>7 Indiana, do hereby certify:</p> <p>8 That at the time and place described above in</p> <p>9 this transcript, the witness was presented before me</p> <p>10 for administration of an oath of truthfulness which</p> <p>11 oath I then administered;</p> <p>12 That I then reported to the best of my ability in</p> <p>13 machine shorthand all of the words spoken by all</p> <p>14 parties in attendance during the course of the ensuing</p> <p>15 proceedings, including objections, if any, made by all</p> <p>16 counsel present;</p> <p>17 That I later reduced my shorthand notes into the</p> <p>18 foregoing typewritten transcript form, which</p> <p>19 typewritten transcript is a true record to the best of</p> <p>20 my ability of the testimony given by the witness as</p> <p>21 stated above;</p> <p>22 That I am not a relative or employee or attorney</p> <p>23 or counsel of any of the parties, nor am I a relative</p> <p>24 or an employee of such attorney or counsel, and that I</p> <p>25 am not financially interested in this action.</p> <p>IN WITNESS HERETO, I have affixed my Notarial Seal</p> <p>and subscribed my signature below this ____ day of</p> <p>_____, 2016.</p> <p>Notary Public</p> <p>County of Residence: Boone (Seal)</p> <p>My Commission Expires on: April 27, 2017</p>

1 STATE OF INDIANA)
2 COUNTY OF BOONE) ss:
3

4 I, Heather S. Orbaugh, the undersigned Court Reporter
5 and Notary Public residing and maintaining offices in the
City of Zionsville, Boone County, Indiana, do hereby certify:

6 That at the time and place described above in this
7 transcript, the witness was presented before me for
administration of an oath of truthfulness which oath I then
8 administered;

9 That I then reported to the best of my ability in
machine shorthand all of the words spoken by all parties in
10 attendance during the course of the ensuing proceedings,
including objections, if any, made by all counsel present;

11 That I later reduced my shorthand notes into the
12 foregoing typewritten transcript form, which typewritten
transcript is a true record to the best of my ability of the
13 testimony given by the witness as stated above;

14 That I am not a relative or employee or attorney or
15 counsel of any of the parties, nor am I a relative or an
employee of such attorney or counsel, and that I am not
financially interested in this action.

16
17 IN WITNESS HERETO, I have affixed my Notarial Seal and
18 subscribed my signature below this 18th day of October,
2016.

19
20
21
22
23
24 Notary Public

County of Residence: Boone (Seal)

25 My Commission Expires on: April 27, 2017

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**CERTIFICATE OF NOTARY AS TO
FAILURE OF WITNESS TO SIGN TRANSCRIPT
WITHIN TIME ALLOWED BY TRIAL RULES**

I hereby certify that HEATHER S. ORBAUGH, a Notary Public in and for the
County of BOONE, State of Indiana, administered an oath at the deposition of
SAMUEL MOFFITT on the 30TH day of SEPTEMBER, 2016;

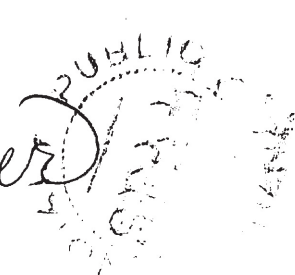
That said deposition transcript was made available to the witness for reviewing
and signing under the applicable rules of procedure;

That the original transcript was either/or

- ☐ RETURNED UNSIGNED
☐ RETAINED BY THE WITNESS
☒ WITNESS FAILED TO SIGN WITHIN TIME PERIOD ALLOWED UNDER RULES.
☐ OTHER EXPLANATION GIVEN _____

We are therefore filing this original unsigned transcript on this 20TH day of
JANUARY, 20 17.

Linda M. Bour
LINDA M. BOUR, NOTARY PUBLIC



County of Residence: MARION
Commission Expires: JUNE 19, 2024

IN THE HENDRICKS COUNTY SUPERIOR COURT
DANVILLE, INDIANA
CAUSE NO. 32D04-1510-PL-150

The deposition upon oral examination of CORY M. HIMSEL, a witness produced and sworn before me, Heather S. Orbaugh, a Notary Public, in and for the County of Boone, state of Indiana, taken on behalf of the Plaintiffs at the offices of Harrington Law, P.C., 105 North Washington Street, Danville, Hendricks County, Indiana on September 6, 2016 pursuant to the Applicable Rules of Procedure.

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A P P E A R A N C E S

FOR ALL PLAINTIFFS:

KIM E. FERRARO
HOOSIER ENVIRONMENTAL COUNSEL
407 EAST LINCOLNWAY
SUITE A
VALPARAISO, IN 46383
(219) 464-0104 (PHONE)
kferraro@hecweb.org

FOR ALL DEFENDANTS:

CHRISTOPHER J. BRAUN
PLEWS SHADLEY RACHER & BRAUN, LLP
1346 NORTH DELAWARE STREET
INDIANAPOLIS, IN 46202
(317) 637-0711 (PHONE)
cbraun@psrb.com

FOR THE DEFENDANT SAMUEL T. HIMSEL, Personally:

BRANDON W. EHRIE
LEWIS WAGNER, LLP
501 INDIANA AVENUE
SUITE 200
INDIANAPOLIS, IN 46202
(317) 237-0500 (PHONE)
behrie@lewiswagner.com

ALSO PRESENT: CLINTON S. HIMSEL (until 12:25 p.m.)

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30 - Letter from Ben Comer dated 03/01/13 to Landowners regarding Letter of Intent to apply for AGI Zoning District	159

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<p>1 Q. As well as Sam Himsel on behalf of 4/9 2 Livestock LLC, correct? 3 A. Yes. 4 Q. And your brother Clint Himsel on behalf of 4/9 5 Livestock LLC? 6 A. Yes. 7 Q. What exactly does Dewey Bucher, what is his 8 involvement at 4/9? 9 A. He doesn't have any at 4/9. 10 Q. He doesn't ever come to the site or inspect 11 the premises or is never -- I'm sorry, let me rephrase 12 that. He is never at the site? 13 A. He has been to the site maybe one or two times 14 since we built. 15 Q. Do you have any understanding of why he is the 16 signatory to the Co-Alliance? 17 A. Well, I know he is -- I know Dewey is in 18 charge of that division of Co-Alliance as far as 19 the -- I think the feed mill and the Northwind Pork. 20 Q. So he signed the contract but basically in his 21 position as a director of certain sections within 22 Co-Alliance that deal with raising hogs? 23 A. Yes. 24 Q. Not because he has any specific involvement at 25 4/9?</p>	<p>1 Q. What date was that initial conversation 2 approximately? 3 A. I don't recall that. 4 (Exhibit 2 marked.) 5 Q. I am showing you what's marked as Exhibit 2, 6 can you identify this document for me? 7 A. Yes. 8 Q. What is it? 9 A. Our Individual Responses. 10 Q. And -- 11 A. And Objections to Plaintiff's Amended First 12 Set of -- 13 Q. We will just do this once, you signed this 14 document turning to Page 38? 15 A. Page 38? Yes. 16 Q. And your signature verified under penalty of 17 perjury that the statements made in the document are 18 true? 19 A. Correct. 20 Q. Turning your attention to Answer 7 -- 21 A. Is that on Page 7? 22 Q. I am sorry, it is Interrogatory 7. 23 MR. BRAUN: Page 13. 24 MS. FERRARO: Page 13. 25 Q. 7-A asks the date of the initial communication</p>
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<p>1 A. Correct, no. 2 Q. Whose idea was it to enter into the hog 3 production contract? 4 A. 4/9 Livestock's. 5 Q. Well, 4/9 Livestock as you know is an LLC, it 6 is not a person, so what person working on behalf of 7 4/9 Livestock decided to enter into the Hog Production 8 Contract? 9 A. It would have been all three of us; myself 10 Clint, and Sam. 11 Q. Anyone else? 12 A. No. 13 Q. Who initiated the conversation with 14 Co-Alliance about entering into the Hog Production 15 Contract? 16 A. I did. 17 Q. You initiated the conversation? 18 A. Yes. 19 Q. Who did you speak with at Co-Alliance? 20 A. First, I think my first call was with Kevin 21 Still. 22 Q. Was that in person? 23 A. No, I just called him on the phone. 24 Q. And you called him? 25 A. Correct.</p>	<p>1 between Co-Alliance and one or more of the individual 2 Himsel defendants; do you see that? 3 A. Yes. 4 Q. And on the next page you answer approximately 5 November 2012. 6 A. Okay. 7 Q. Does that refresh your recollection as to when 8 the initial conversation took place between you and 9 Kevin? 10 A. Yes. I just didn't recall the exact date, but 11 yeah, that makes sense. 12 Q. That's okay. And you said only -- during the 13 initial conversation it was just you and Kevin Still? 14 A. Yeah, it was a very -- I just called Kevin to 15 see what -- we were already in the -- that's not we, 16 Himsel Brothers were already in a hog finishing 17 contract with Co-Alliance at that time and we were 18 looking for ways to expand and I just -- I was calling 19 Kevin to see what his thoughts were on that. 20 Q. Was the number of hogs that you would have at 21 a potential new hog operation discussed? 22 A. I don't recall talking -- I don't recall 23 talking numbers, no. 24 Q. All right. 25 MR. BRAUN: You are talking about in the</p>

1 initial conversation?

2 MS. FERRARO: Yes.

3 A. No, that was more so if we wanted to build

4 more barns with Co-Alliance to fill them.

5 Q. Are you finished with your answer?

6 A. Yes.

7 Q. Was the type of operation discussed, what type

8 of operation you would build?

9 A. No.

10 Q. Was the location of the new hog farm

11 discussed?

12 A. No.

13 Q. What did Kevin Still say in response to your

14 general request for his thoughts?

15 A. He was for it and he would talk with his

16 people, with Dewey Bucher, and that was basically how

17 the conversation went.

18 Q. Okay. Just to be clear, your initial

19 conversation was about expanding hog operations for

20 Himsel Brothers, correct?

21 A. No.

22 Q. 4/9 had not been created yet, correct?

23 A. It was basically just a general question, if

24 we wanted to expand, could we.

25 Q. Who would "we" be?

1 A. Myself and my brother Clint, basically I think

2 that's what -- very just kind of an off-the-cuff like

3 just called him up just to see if that was a

4 possibility.

5 Q. So at the time of the initial conversation,

6 you called on behalf of yourself and your brother

7 Clint about entering into a hog production contract

8 with Co-Alliance?

9 A. We didn't talk about any contract or anything

10 like that, it was just a general question if we wanted

11 to -- if I wanted to or we wanted to build a hog

12 building, would Co-Alliance fill it with pigs, that

13 was it right there.

14 Q. So at that point, though, it was not on behalf

15 of Himsel Brothers, it was on behalf of you and your

16 brother?

17 A. Yeah.

18 Q. So going on past that, what was the next stage

19 in that process of conversation with Co-Alliance?

20 A. With Co-Alliance?

21 Q. Yes.

22 A. Our next step was we formed our LLC in

23 January, between November and January not much was

24 done that I recall.

25 Q. Was the initial plan for the Hog Production

1 Contract to be with Midland Co-op?

2 A. Midland Co-op is -- Co-Alliance has gotten

3 Midland, we still call the local Co-Alliance branch in

4 town where we buy fertilizer and seed and whatnot

5 Midland because that's what it was -- that's what it

6 was to us. And then it has formed into Co-Alliance so

7 I'm not sure why it would have been called Midland

8 Co-op, but sometimes we refer to Co-Alliance as

9 Midland because that's what they were called before

10 the merger, before they formed Co-Alliance.

11 Q. Okay.

12 (Exhibit 3 marked.)

13 Q. Showing you what's been marked as Exhibit 3,

14 can you identify this document?

15 A. Yes.

16 Q. Please do.

17 A. It is the Letter of Intent that Ben Comer

18 wrote.

19 Q. If you look to the third paragraph it says,

20 "The Himsel family will be feeding pigs owned by

21 Midland Co-Alliance LLP of Danville." Do you see

22 that?

23 A. Right, yeah.

24 Q. Does that change your answer that the initial

25 plan wouldn't have been with Midland Co-Alliance?

1 A. It wouldn't have been. If we called it

2 Midland Co-Alliance to Ben, might have, because we

3 referred to it as that, but Co-Alliance is -- I mean

4 it is the same -- that's the same thing to me, Midland

5 Co-Alliance or just Co-Alliance. It is the same group

6 of people.

7 Q. Okay. So Midland is Co-Alliance essentially?

8 A. Correct. It is a -- when they -- as they

9 bought local co-ops, which started at Midland, Midland

10 would have been one and I think maybe had one in

11 Lebanon, I can't remember what they called -- what

12 their co-op was called, but they all come together for

13 Co-Alliance, so it is the same.

14 Q. Okay. If you look to the second paragraph you

15 will see that the petitioner currently has four hog

16 barns located on three different sites in Center

17 Township, Hendricks County; do you see where I am

18 reading there?

19 A. Yes.

20 Q. And it says the existing facilities have been

21 in operation for many years, is that referring to the

22 Himsel Brothers' facilities?

23 A. Correct.

24 Q. And then to the third paragraph that I

25 referred to before, the Himsel family will be feeding

1 Q. And they appear to be signed, there is three
 2 of them, they appeared to be signed on December 17,
 3 2012; is that correct?
 4 A. Yes.
 5 Q. And these are land use agreements between 4/9
 6 Livestock, the first one is with Clint Himsel, the
 7 second one is with Cory Himsel, and the third one is
 8 with Sam Himsel, correct?
 9 A. Correct.
 10 Q. Does this indicate to you that the decision
 11 when to create the 4/9 Livestock facility occurred
 12 some time before December 17, 2012?
 13 A. Yes. It looks that way.
 14 Q. Do you happen to recall when that decision was
 15 made?
 16 A. Decision to?
 17 Q. To create the 4/9 Livestock, LLC?
 18 A. I don't have an exact date on -- I could tell
 19 you probably between the end of November to the
 20 beginning of December, somewhere in between that time
 21 frame.
 22 Q. It's correct that 4/9 Livestock, LLC, had not
 23 been created yet at the time these Manure Land Use
 24 Agreements were entered into, correct?
 25 A. Correct.

1 Q. 4/9 Livestock, LLC, was actually created on
 2 January 16, 2013, correct?
 3 A. Correct.
 4 MR. BRAUN: Mind if we take a quick
 5 break?
 6 MS. FERRARO: Sure.
 7 (Short recess.)
 8 MR. BRAUN: You asked questions of Cory
 9 about 7 and existing facilities in the subject parcel,
 10 and rather than get that corrected on the errata
 11 sheet, we want to go ahead and raise it now, go ahead
 12 and correct the record on that, if you would, so that
 13 Kim can ask him questions if she wants.
 14 MS. FERRARO: I would just object to the
 15 fact that you will get to cross-examine and clarify
 16 when you have that opportunity.
 17 MR. BRAUN: Well, the answer -- you want
 18 a correct answer, don't you?
 19 MS. FERRARO: I do want a correct answer
 20 but we have an agreement that if I ask a question and
 21 he answers it, he supposedly understood my question.
 22 So if you feel that he is not testifying accurately,
 23 you can correct that on your cross-examination.
 24 MR. BRAUN: Okay.
 25 DIRECT EXAMINATION, Continued

1 BY MS. FERRARO:
 2 Q. What is the significance of the name 4/9
 3 Livestock?
 4 A. I mean how did we come up with that name?
 5 Q. Yes.
 6 A. The 4 is for April, which is my birth date
 7 month, and 9 is September which is his birth date
 8 month. That's how we came up with it.
 9 Q. I was just curious. It has absolutely nothing
 10 to do with anything. The Himsel family has several
 11 other LLCs, don't they?
 12 A. Different entities?
 13 Q. Yes.
 14 A. Yes.
 15 Q. Do you know the names of some of those other
 16 entities?
 17 A. There is Himsel Brothers, there is Lee and
 18 Doris Himsel, which I believe that's a corporation.
 19 Those are the only two I know of.
 20 (Exhibit 9 marked.)
 21 Q. That's Exhibit 9. This is a search result
 22 from the Indiana Secretary of State website that I did
 23 looking for various LLCs for Himsel Brothers.
 24 A. Okay.
 25 Q. And I note on here Himsel's First Quality

1 Pork, which is at 4230 North County Road 200 West in
 2 Danville; is that your father's address?
 3 A. Yeah, that's my dad's address now, yes.
 4 Himsel's First Quality Pork and Himsels.com are no
 5 longer in business.
 6 Q. Himsel's First Quality Pork and Himsels.com
 7 state that they are still active, that's not correct?
 8 A. Maybe the state has it as active but there is
 9 nothing going on with that.
 10 Q. And then down below I see Lee and Doris Himsel
 11 Farms?
 12 A. Corporation?
 13 Q. Also at 4230 North 200 West, Danville; do you
 14 see that?
 15 A. Yes.
 16 Q. Would that be another one of the entities?
 17 A. That one's right, that's an entity, my
 18 grandparents' entity or corporation they had with
 19 their kids.
 20 Q. There isn't actually an entity called Himsel
 21 Brothers Farm, is there?
 22 A. It's always been called Himsel Brothers to me,
 23 Himsel Brothers Grain and Livestock and Himsel
 24 Brothers now. Maybe it is just a partnership.
 25 Q. Okay. But these LLCs --

1 A. No.
2 Q. Can you point me to any provision in the 4/9
3 operating agreement that would allow you to cause harm
4 to people or property without personal consequences as
5 long as you are acting as an agent of 4/9?

6 MR. BRAUN: Same objection. Again,
7 there is lack of foundation, there has been no
8 evidence provided that there has been any act or
9 violation by 4/9 Livestock or an individual in this
10 case. The document speaks for itself and subject to
11 interpretation, this witness is not a lawyer, did not
12 draft the document, and subject to that, if you can
13 answer the question, you are welcome to.

14 A. No.
15 Q. Going to Page 17 under Section 5.4, Duties of
16 the Parties, it states that, "A member shall not be
17 liable, responsible, or accountable and damages
18 otherwise to the company or to any other member for
19 any action taken or any failure to act on behalf of
20 the company within the scope of the authority
21 conferred upon the member by this agreement or by law
22 except for fraud, bad faith, or gross negligence." Do
23 you see that?

24 A. Yes.

25 Q. This provision doesn't state that a member,

1 parties for any such action taken or not taken on
2 behalf of 4/9 Livestock that causes harm to those
3 third parties; does it say that?

4 MR. BRAUN: Again, I will object, the
5 document speaks for itself. The language in here as
6 drafted has legal implications, the scope of the
7 authority provided in here, what constitutes fraud,
8 what constitutes negligence, are all questions to be
9 answered not by this witness but by the fact finder or
10 by the court in this case, and to ask the witness what
11 the document does not include in here is equally lack
12 of foundation. So subject to that, if you know, you
13 are welcome to answer the question.

14 A. I'm not sure.

15 Q. You are not sure that it states or doesn't
16 state what it states; is that what you are saying?

17 A. Correct.

18 Q. Going to Section 5.51, that provision states
19 that a member shall not be liable, responsible, or
20 accountable in damages or otherwise to any other
21 member or company for any act performed by the member
22 with respect to company matters except for willful or
23 reckless misconduct; do you see that?

24 A. Uh-huh.

25 Q. And, again, to your understanding and your

1 and by member it would presumably be the signatories
2 to the document, correct; you, your father, and Clint?

3 A. Correct.

4 Q. This provision doesn't state that a member
5 shall not be liable to third parties for any such
6 action taken on behalf of the company that may cause
7 harm to the third parties, does it?

8 MR. BRAUN: Again, objection, lack of
9 foundation, improper hypothetical, witness is not an
10 attorney. This document speaks for itself and the
11 scope of the language in the agreement speaks for
12 itself. This witness is not qualified to testify as
13 to the scope of Paragraph 5.4, Duties of the Parties,
14 or any other provision within this agreement. Subject
15 to that, if you know, you are welcome to answer the
16 question.

17 A. I don't know.

18 Q. Well, you signed this document in which you
19 agree to be legally bound to the terms, and you stated
20 that you read it and generally understood its terms,
21 correct?

22 A. Correct.

23 Q. And I am just asking you to read Paragraph 5.4
24 and agree or disagree whether or not that provision
25 states that a member shall not be liable to third

1 reading, not as a lawyer, as a layperson, does this
2 provision state that a member shall not be liable to
3 third parties for any such act performed with respect
4 to company matters that causes harm to the third
5 parties?

6 MR. BRAUN: Same objection, lack of
7 foundation, it is a legal document drafted by someone
8 other than this witness who is not a lawyer. This is
9 subject to interpretation by the court as to what each
10 of the words in here mean, it has legal connotations
11 this witness is not qualified to issue an opinion or
12 to testify about. Subject to that, you are welcome to
13 answer the question.

14 A. I would say that I'm not liable, yes.

15 Q. That wasn't my question, but I understand this
16 is getting --

17 A. It is --

18 Q. I understand. Let's try it again. So as you
19 read the provision, the plain language of the
20 provision that you signed and agreed to be legally
21 bound to, to your understanding and in reading that
22 provision, it does not state that a member shall not
23 be liable to third parties for any such act performed
24 with respect to company matters that causes harm to
25 the third parties. It only says that the member shall

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<p>1 Brothers had been using, correct?</p> <p>2 A. Periodically over time we hauled -- try to get</p> <p>3 around to all of them over so many years.</p> <p>4 Q. So what is -- and I guess what I am trying to</p> <p>5 understand is what is it that was unique about where</p> <p>6 the site for the CAFO is compared to any of the other</p> <p>7 properties given that the manure application sites</p> <p>8 have not changed?</p> <p>9 A. All these can be reached through the drag</p> <p>10 line.</p> <p>11 Q. And they couldn't at any of the other</p> <p>12 properties?</p> <p>13 A. No, not that I am aware of.</p> <p>14 Q. Without going through each of them, would it</p> <p>15 be fair to say that the siting factors that are listed</p> <p>16 in your interrogatory answers were considered either</p> <p>17 because IDEM required it or the county required it</p> <p>18 with respect to the rezoning of property?</p> <p>19 A. Yes, we followed all the guidelines that we</p> <p>20 had to.</p> <p>21 Q. And so those factors really didn't go into</p> <p>22 your decision about where to locate it, it came in to</p> <p>23 just ensuring that that site that you selected</p> <p>24 conformed to regulatory and zoning requirements?</p> <p>25 A. No, we took -- these would have been used,</p>	<p>1 testimony, but subject to that you can answer the</p> <p>2 question.</p> <p>3 A. I know we hired JBS United to help us through</p> <p>4 the phase, building phase so we did everything the</p> <p>5 right way.</p> <p>6 Q. And you basically said, okay, Mr. Kinker,</p> <p>7 Mr. Consultant, this is the property we would like to</p> <p>8 construct our CAFO on, please help us make sure that</p> <p>9 it complies with zoning requirements and IDEM</p> <p>10 requirements?</p> <p>11 A. Correct.</p> <p>12 Q. So you had decided -- I am just trying to get</p> <p>13 a firm answer that you had decided on the location</p> <p>14 before you brought in the consultants? Now, if they</p> <p>15 had told you it doesn't comply, you might have changed</p> <p>16 your mind, I understand that, but the site had been</p> <p>17 selected and then you hired the consultants?</p> <p>18 MR. BRAUN: And I will object, that</p> <p>19 misstates the testimony including the response in</p> <p>20 Interrogatory Number 13 where it says 4/9 Livestock</p> <p>21 consulted with and relied upon various persons and</p> <p>22 entities in making the decision to site and build 4/9</p> <p>23 CAFO in this location as stated in the answer to the</p> <p>24 Interrogatory Number 12. Beyond that, if you have</p> <p>25 additional information you are welcome to testify.</p>
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<p>1 too, yeah.</p> <p>2 Q. To make sure that they complied with IDEM and</p> <p>3 zoning requirements?</p> <p>4 A. Yes.</p> <p>5 Q. Not because of any concern that odors or air</p> <p>6 emissions might potentially impact neighbors?</p> <p>7 A. Yeah, I am not aware of that, no.</p> <p>8 Q. The time that you, your brother, and your</p> <p>9 father decided to construct the CAFO and select that</p> <p>10 particular site, were you aware of what IDEM required?</p> <p>11 A. As far as?</p> <p>12 Q. What you needed to do in order to construct</p> <p>13 the CAFO that you wanted to construct?</p> <p>14 A. That's where we hired Dan Kinker of JBS United</p> <p>15 to help us through that process.</p> <p>16 Q. Okay. And that, again, was after you had</p> <p>17 already decided that that was where you were going to</p> <p>18 construct the CAFO?</p> <p>19 A. No, he was -- no, I would say no. I think we</p> <p>20 talked with him before, before a firm decision on</p> <p>21 where we were putting that barn at.</p> <p>22 Q. So then these were your considerations, the</p> <p>23 factors that you list, not Dan Kinker's and not the</p> <p>24 consultant's factors?</p> <p>25 MR. BRAUN: Objection, misstates his</p>	<p>1 A. I have no additional information.</p> <p>2 Q. Well, I guess I am just confused because I am</p> <p>3 trying to understand who it is that I would talk to to</p> <p>4 understand whether it is you or the consultants about</p> <p>5 how these factors were derived, and you earlier told</p> <p>6 me that your father and you and your brother decided</p> <p>7 on this location and brought in consultants to make</p> <p>8 sure that you met regulatory requirements and zoning</p> <p>9 requirements.</p> <p>10 MR. BRAUN: I will object, misstates his</p> <p>11 testimony. He said they were considering this</p> <p>12 location and brought in the consultants to assist them</p> <p>13 in making a decision where to site the CAFO. Subject</p> <p>14 to that, you may answer the question.</p> <p>15 A. That's correct, what he said, yeah.</p> <p>16 Q. What other parcels were considered then?</p> <p>17 A. There weren't any.</p> <p>18 Q. Well, if there weren't any other parcels</p> <p>19 considered, how did these factors in any way influence</p> <p>20 the decision about where to locate the CAFO?</p> <p>21 A. Again, we brought in -- we hired JBS United to</p> <p>22 help us through this process.</p> <p>23 Q. After the decision where to locate the CAFO</p> <p>24 had already been made, correct?</p> <p>25 MR. BRAUN: Objection, the question has</p>

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<p>1 been asked and answered and what the witness has 2 testified to twice now is that they were considering 3 this location, they brought in the experts that are 4 reflected in their answers in Interrogatory Number 12 5 to assist them in making a decision as to the siting 6 of this, and as you questioned as to the requirements 7 of IDEM and the county. Subject to that, if you have 8 anything else to add to that beyond that, you are 9 welcome to answer. 10 A. I don't have any more to add. 11 Q. But no other parcel was ever considered, 12 correct? 13 A. Correct. 14 (Exhibit 16 marked.) 15 Q. I am showing you Exhibit 16, do you recognize 16 this letter? 17 A. Yes. 18 Q. Can you identify it for the record? 19 A. It is the letter that Kevin Still wrote in 20 support of our request for zoning change. 21 Q. And it is dated February 5, 2013? 22 A. Correct. 23 Q. You note in the letter Kevin Still identifies 24 the property where the CAFO is located; do you see 25 that?</p>	<p>1 to the writing of this letter? 2 A. We had no formal contract at that time. 3 Q. Right, the general terms had been agreed to, 4 though, correct? 5 A. I can't speculate that any terms were agreed 6 to, I don't remember at that time what we had agreed 7 on. 8 Q. Would you allow Kevin Still to state in a 9 letter that Co-Alliance would have a particular -- 10 would own the hogs and Sam Himself would raise them or 11 feed them? Is that something that he would be able to 12 represent without your understanding and permission? 13 A. No, no. 14 Q. So back to my question, generally it was 15 understood what the terms of the contract would be, I 16 understand it hadn't been formally entered into yet? 17 A. Yeah. 18 Q. And would it also be fair to say given the 19 date of this letter of February 5, 2013, is prior to 20 the rezoning hearing, correct? 21 A. Yeah, because this letter was in favor or 22 support of it. 23 Q. Was it also submitted and written prior to 24 4/9's application to IDEM? 25 A. I think so.</p>
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<p>1 A. Yes. 2 Q. Is it fair to say that the site was selected 3 some time before this letter was written on February 4 5, 2013? 5 A. Yes. 6 Q. Do you know who provided Kevin Still with 7 information about site selection for purposes of this 8 letter? 9 A. I guess Ben Comer. 10 Q. And you or your brother or your father would 11 have provided that information to Mr. Comer? 12 A. Yes. 13 Q. Kevin Still is the president and CEO of 14 Co-Alliance, correct? 15 A. The CEO, yes. 16 Q. How long have you known Mr. Still? 17 A. Since I was a kid. 18 Q. I note that the letter states that, 19 "Co-Alliance will be the owner of the livestock and 20 Sam Himself will have the care, custody, and control of 21 the hogs and will act as Co-Alliance's contract 22 grower." Do you see that? 23 A. Uh-huh, yes. 24 Q. Fair to say that the terms of the hog 25 production contract had been generally agreed to prior</p>	<p>1 Q. Would it be fair to say then that the general 2 terms of the 4/9 contract had been decided prior to 3 the rezoning and the IDEM permitting process? 4 MR. BRAUN: I will object, the question 5 has been asked and answered. The general concept, 6 yes, in terms of the terms of the contract as per 7 Exhibit 1, those weren't agreed upon and signed until 8 much later in the year. Subject to that, you can 9 answer the question. 10 A. Yes, we had a general idea on how it worked, 11 but there was no formal contract. 12 Q. And the letter doesn't name 4/9 Livestock as 13 the entity that would be acting as Co-Alliance's 14 contract grower, correct? 15 A. It does not state that, and probably should. 16 I think a lot of times in this early-on stage of our 17 LLC my dad's last -- his name, our last name, Himself 18 family, Sam Himself, Clint Himself, was used as a 19 recognition, so people could recognize who 4/9 20 Livestock was and the quality of work that we do. 21 Yes. 22 Q. The name Sam Himself but not Cory or Clint 23 Himself? 24 A. Yeah, I think I am named down a paragraph. 25 Q. Is it also fair to say that as of February 5,</p>

1 Q. Okay. But you didn't?

2 A. No, I relied on somebody else.

3 Q. Do you see under Factors Impacting the Zone of

4 Influence of a Swine Site it says, "There is no one

5 right answer to the question how far will odors

6 travel, but understanding the factors which influence

7 odor transmission helps to minimize impacts on

8 neighbors. Factors include," and the first one is

9 wind direction. "The predominant direction of the

10 wind is an important factor in examining the potential

11 impact on neighbors." Do you see that?

12 A. Yes.

13 Q. And you testified earlier that wind direction

14 was not something that you considered or your father

15 or your brother considered in siting the CAFO,

16 correct?

17 A. Like I said, I considered the experts we used

18 and their advice.

19 (Exhibit 24 marked.)

20 Q. If you go down onto Exhibit 23, the Pork

21 Checkoff brochure, wind direction, it shows a picture

22 of what's called a wind rose and it describes the

23 graph -- here, Figure 1 shows an example from Des

24 Moines, Iowa, for July. The graph shows that, "Wind

25 originates from the south approximately 13 percent of

1 the time followed by south-southeast 11 percent. This

2 means that for Des Moines locating a swine unit

3 directly south of neighbors would not be wise.

4 Consult wind data for the general area before

5 selecting a site." Do you see that?

6 A. Yes.

7 Q. Showing you Exhibit 24, it is a wind rose for

8 Indianapolis, which is half an hour from Danville; is

9 that right?

10 A. Roughly, yeah.

11 Q. And it shows that wind direction is

12 predominantly south 20 percent of the time and

13 southwest predominantly 12 percent of the time.

14 Living in the area all your life, would you agree that

15 prevailing winds are south, southwest?

16 MR. BRAUN: I will object to the extent

17 lack of foundation as well as the relevance to the

18 reference to Exhibit 23 and the wind conditions and

19 directions in Des Moines, Iowa, as it relates to this

20 case, and also this witness is not an expert in wind

21 direction and he has testified previously he has

22 relied upon experts to work through these issues.

23 Subject to that, you are welcome to answer the

24 question.

25 Q. My question is given that you have lived in

1 the area all your life, would you disagree with this

2 wind rose that prevailing winds are mostly from the

3 south, southwest direction?

4 MR. BRAUN: Again, I will object. This

5 is a snapshot of one day in the month of December of

6 2012, it is out of context, and to ask this witness

7 what the wind direction has been for the past 39 years

8 of his life based on a one-day snapshot or a 30-day

9 snapshot is improper and lacks foundation. Subject to

10 that, you can answer the question.

11 A. I couldn't say. I don't know.

12 Q. As a farmer, wind direction and weather

13 patterns are not important to your business?

14 A. Rain is important to the business. Wind

15 isn't.

16 Q. Paying attention to the wind is not -- just

17 generally living in the area you don't have any

18 idea --

19 A. I can't say for sure. The wind, it could vary

20 from hour to hour.

21 Q. Any reason to disagree with a study that says

22 that wind direction is south/southwest in your area?

23 MR. BRAUN: Again, same objection. It

24 is a purported diagram for a one-month period in 2012,

25 the year before the 4/9 Livestock barns were built.

1 Subject to that, you can answer the question.

2 A. I really don't know.

3 Q. Well, I will ask you to assume for my next

4 question that prevailing winds in your area are from

5 the south/southwest. Okay? I am asking you to assume

6 it, you don't have to agree with it. Are the

7 plaintiffs in this case, Bob and Susan Lannon, as well

8 as Richard and Janet Himsel, their properties are to

9 the north of the 4/9 CAFO, aren't they?

10 A. North?

11 Q. North of the 4/9 CAFO?

12 A. Yes.

13 Q. So assuming that winds are from the south and

14 southwest, any odors and air emissions that would be

15 coming off the 4/9 CAFO would be blowing in their

16 direction; isn't that correct?

17 A. I really don't know. I am not on their

18 property so I wouldn't be able to tell you.

19 Q. That wasn't my question. Assuming that winds

20 are from the south/southwest, if there are odors and

21 air emissions from the 4/9 CAFO, they would be blown

22 on the Lannon's and the Himsel's property, correct?

23 MR. BRAUN: I will object, again, to the

24 extent that the majority of the time the winds are

25 blowing directions other than south/southwest.

<p style="text-align: right;">Page 146</p> <p>1 is through the 4-H fair.</p> <p>2 Q. Okay. Suffice it to say given that Purdue is</p> <p>3 here in Indiana and there is an extension office near</p> <p>4 you, if you wanted information from the Purdue</p> <p>5 Extension, you would have access to it, correct?</p> <p>6 A. Correct.</p> <p>7 Q. Did you consult any Purdue Extension</p> <p>8 publications at the time you and your father and</p> <p>9 brother were considering constructing the CAFO?</p> <p>10 A. No. We hired the experts to -- I don't know</p> <p>11 if they contacted them or not.</p> <p>12 (Exhibit 27 marked.)</p> <p>13 Q. This is Exhibit 27, which you will see at the</p> <p>14 bottom is a download from the Purdue Extension</p> <p>15 website. Turning to the last page you will see that</p> <p>16 it was published in January of 1999. Just going to</p> <p>17 the very first paragraph it says, "Odors emitted</p> <p>18 mainly from manure but also from decaying feed and</p> <p>19 carcasses are a major concern of the pork industry.</p> <p>20 Larger swine facilities and increased public concern</p> <p>21 over agricultural odors have resulted in a number of</p> <p>22 well-published conflicts in recent years. Purdue and</p> <p>23 other universities are addressing these problems</p> <p>24 through research and educational programs."</p> <p>25 I am assuming given your prior testimony that</p>	<p style="text-align: right;">Page 148</p> <p>1 Q. And the very first feasible method, one that</p> <p>2 Purdue states is economically feasible is site</p> <p>3 selection. It says, "In selecting a site, consider</p> <p>4 distance to nearby homes and public facilities based</p> <p>5 on number and weight of pigs, odor abatement practices</p> <p>6 used, facility design and management, prevailing wind</p> <p>7 direction, topography, and land use." Do you see</p> <p>8 that?</p> <p>9 A. Yes.</p> <p>10 Q. And one more sentence, it says, "You can use</p> <p>11 an odor setback guideline under development at Purdue</p> <p>12 to calculate appropriate setbacks." Again, based on</p> <p>13 your prior testimony, these considerations were not</p> <p>14 considered by you or your consultants in deciding</p> <p>15 where to locate the 4/9 CAFO, correct?</p> <p>16 MR. BRAUN: I will object, that</p> <p>17 misstates the testimony of the witness previously and</p> <p>18 also I will object to this document, he has never seen</p> <p>19 this document before today, it was not produced in</p> <p>20 discovery, the document speaks for itself. It seems</p> <p>21 to me the authors of the document might be in a better</p> <p>22 position to issue any opinions or interpretations of</p> <p>23 this document. Subject to that, you may answer the</p> <p>24 question.</p> <p>25 A. I would say our experts -- we did use -- the</p>
<p style="text-align: right;">Page 147</p> <p>1 you haven't heard about any of the research or</p> <p>2 educational programs at Purdue on this issue, correct?</p> <p>3 A. No, I haven't.</p> <p>4 Q. And you didn't realize or hadn't heard that</p> <p>5 odor emitted mainly from manure is a major concern for</p> <p>6 the pork industry and it wasn't something that you had</p> <p>7 heard either, correct?</p> <p>8 A. Correct.</p> <p>9 Q. It goes on to say, "This publication describes</p> <p>10 all known methods and practices that may reduce odor</p> <p>11 nuisance from swine production units there categorized</p> <p>12 as feasible methods or methods under research and</p> <p>13 development. The feasible methods are those which</p> <p>14 have been shown to be both economically and</p> <p>15 technically feasible for some farms. Methods under</p> <p>16 research and development are currently generally not</p> <p>17 feasible for pork production either economically or</p> <p>18 technically or both."</p> <p>19 It goes on to say, "When deciding which</p> <p>20 individual measures to use to reduce odors from swine</p> <p>21 facilities, producers should take care that measures</p> <p>22 they carry out in one part of the operation does not</p> <p>23 increase odor production from the overall operation."</p> <p>24 See where I am reading there?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 149</p> <p>1 experts we hired to help manage this, the building</p> <p>2 process, would have used these factors for the</p> <p>3 facility design. Having the hogs gathered inside and</p> <p>4 controlling them indoors and not spread out over 20 or</p> <p>5 30 acres would be a practice that we would be using.</p> <p>6 Other than that, we left it up to the experts that</p> <p>7 guided us through this process.</p> <p>8 As far as setbacks, we met every county and</p> <p>9 IDEM setback that we needed to do. Other than that, I</p> <p>10 don't know anymore.</p> <p>11 Q. But you didn't consider prevailing wind</p> <p>12 direction?</p> <p>13 A. I don't know that the experts that we hired</p> <p>14 didn't.</p> <p>15 Q. Everything about -- even though you selected</p> <p>16 the site initially and no other site was selected, it</p> <p>17 is your testimony that your experts considered all</p> <p>18 these factors in selecting a site?</p> <p>19 MR. BRAUN: Objection, it misstates his</p> <p>20 testimony earlier. He said they were considering this</p> <p>21 site when they hired experts to come in to help with</p> <p>22 the site selection. Subject to that, you may answer</p> <p>23 the question.</p> <p>24 A. Correct. We had a site that we knew about,</p> <p>25 had them come in, look at that site before a permanent</p>

<p style="text-align: right;">Page 154</p> <p>1 officials about ammonia and hydrogen sulfide emissions 2 from their operations if they emit 100 pounds or more 3 of these substances in any 24-hour period." 4 First question, the 4/9 CAFO has 8,000 hogs, 5 correct, at any one time? 6 A. Correct. 7 Q. Okay. Then going down a little bit further 8 where it says Final Rule Requires Limited Recording, 9 that heading, and it says, "Last month the USEPA 10 published a final rule agreeing with the National Pork 11 Producers Council that air emissions from concentrated 12 animal feeding operations did not need to be reported 13 under the CERCLA law; however, EPA did require that 14 large CAFOs, swine facilities of 2500 or more animals 15 of 55 pounds or 10,000 head or more animals of less 16 than 55 pounds must notify state and local emergency 17 response officials about ammonia and hydrogen sulfide 18 emissions from their operations under the EPCRA law." 19 Assuming this fact sheet is accurate, the 4/9 facility 20 has more than 2500 more animals of 55 pounds or more, 21 correct? 22 A. Correct. 23 Q. So assuming this fact sheet is correct, you 24 potentially, 4/9 has reporting requirements under the 25 EPCRA law according to this fact sheet?</p>	<p style="text-align: right;">Page 156</p> <p>1 of -- safety and risk department, they kind of 2 specialize in that. This potential future 3 environmental issue, it could be some similar -- 4 something similar to fertilizer and manure spill would 5 be what I would consider they were talking about. 6 Q. Did their safety and risk department help 7 you -- help 4/9 with any of the zoning or permitting 8 requirements for the 4/9 CAFO? 9 A. No, we didn't hire them to help with any of 10 that. 11 Q. They didn't lead you to any of your 12 consultants or -- 13 A. No. 14 Q. The letter also states that Cory Himsel is the 15 nearest neighbor and next nearest neighbor is 16 approximately one-half mile away from the proposed 17 58-acre site; do you see that? 18 A. Yes. 19 Q. The statement that other than you the nearest 20 neighbor or other than you the nearest neighbor is 21 one-half mile away is not accurate, is it? 22 A. I honestly don't know what the number is 23 without you telling me. Off the top of my head, I 24 don't know. Without a Google map in front of me, I 25 don't know.</p>
<p style="text-align: right;">Page 155</p> <p>1 A. Yes, I would rely on my JBS United expert to 2 handle this. 3 Q. And he has not mentioned anything to you about 4 this? 5 A. We haven't talked about it, no. 6 Q. And fair to say you haven't done any reporting 7 of ammonia emissions to state or local emergency 8 response committees, correct, on behalf of 4/9? 9 A. Right. 10 Q. I am going to go back to an exhibit we were 11 looking at before, Exhibit 16, the Co-Alliance support 12 letter, if you could pull that out again. Are you 13 ready? 14 A. I have got it in front of me. 15 Q. All right. Great. The letter states that 16 Co-Alliance will assist Sam Himsel with potential 17 future environmental issues; do you see where it says 18 that? 19 A. Yes. 20 Q. What is your understanding of the 21 environmental issues that Co-Alliance would be helping 22 Sam Himsel with? 23 A. I'm not sure on that. I do know what 24 Co-Alliance helps with as far as other farmers, a 25 fertilizer spill or grain bin suffocation, that type</p>	<p style="text-align: right;">Page 157</p> <p>1 Q. Well, assuming that I did Google it, Richard 2 and Janet Himsel are approximately 1,600 feet away, 3 John and Debbie Conter are 1,700 feet away, Earnest 4 and Mary Combs are 2,000 feet away; that's all within 5 a half mile? 6 A. Okay. 7 Q. So that statement is not accurate, correct? 8 MR. BRAUN: I will object, the document 9 speaks for itself. It also says approximately 10 one-half mile away. It is an estimation. Subject to 11 that, you can answer the question. 12 A. I am not going to speculate on what Kevin was 13 saying, but it is approximately. 14 (Exhibit 29 marked.) 15 Q. I am showing you Exhibit 29, which is the 16 Affidavit of Notice of Public Hearing of the Hendricks 17 County Planning Commission signed by your attorney Ben 18 Comer and dated February 8, 2013, a document produced 19 by 4/9. You have seen this document before? 20 A. Yes. 21 Q. This was submitted as part of the rezoning 22 application? 23 A. Correct. 24 Q. Given that the date of this is February 8, 25 2013, can we assume the application was submitted some</p>

<p style="text-align: right;">Page 158</p> <p>1 time before that date?</p> <p>2 A. I would say so.</p> <p>3 Q. And the affidavit states that it is the</p> <p>4 rezoning application of Samuel T. Himsel; do you see</p> <p>5 that?</p> <p>6 A. Uh-huh.</p> <p>7 Q. It doesn't say rezoning application of 4/9?</p> <p>8 A. Sam owned the property at the time, yes.</p> <p>9 Q. The affidavit states that, "Utility companies,</p> <p>10 local fire departments, schools, and incorporated</p> <p>11 towns within 2 miles of the property were notified of</p> <p>12 the March 12, 2013, public hearing." Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And it says that these utilities,</p> <p>15 schools, and towns within two miles received notice</p> <p>16 because they were considered affected by the rezoning</p> <p>17 plans; do you know what that means? Affected in what</p> <p>18 way?</p> <p>19 A. I don't know.</p> <p>20 Q. Nevertheless it states that these utilities,</p> <p>21 schools, and towns within two miles received 30 days'</p> <p>22 notice of the March 12, 2013, public hearing on</p> <p>23 rezoning application, correct?</p> <p>24 A. Correct.</p> <p>25 Q. And the next page after the affidavit is the</p>	<p style="text-align: right;">Page 160</p> <p>1 Q. This is Exhibit 30. This is a letter dated</p> <p>2 March 1, 2013, from your attorney Ben Comer to</p> <p>3 landowners notifying them of the March 12, 2013,</p> <p>4 public hearing; have you seen this document before?</p> <p>5 A. Yes.</p> <p>6 Q. This was produced by 4/9 as well. The letter</p> <p>7 to the landowners states that, "Samuel T. Himsel has</p> <p>8 petitioned the planning commission for a rezoning of</p> <p>9 the property from AGR, agriculture residential zoning</p> <p>10 district to the AGI, agriculture intense zoning</p> <p>11 district; do you see that?</p> <p>12 A. Yes.</p> <p>13 Q. And that is your understanding of what the</p> <p>14 rezoning application was requesting, correct?</p> <p>15 A. Correct.</p> <p>16 Q. Again, it doesn't state that 4/9 was</p> <p>17 submitting the petition for the rezone but Samuel T.</p> <p>18 Himsel, correct?</p> <p>19 A. Correct, because he owned the farm he had to</p> <p>20 do that first, yes.</p> <p>21 Q. So going -- just referring back and forth to</p> <p>22 Exhibit 29, the notice to the utilities and towns, the</p> <p>23 affected utilities, schools, and towns received more</p> <p>24 than 30 days' notice from Ben Comer, correct? We</p> <p>25 already established --</p>
<p style="text-align: right;">Page 159</p> <p>1 letter that Ben Comer actually sent to the utilities,</p> <p>2 schools, and towns on February 8, 2013, notifying them</p> <p>3 of the March 12th public hearing on the rezoning</p> <p>4 application, correct?</p> <p>5 A. Correct.</p> <p>6 Q. And then the final page lists the affected</p> <p>7 utilities, towns, and schools within two miles that</p> <p>8 were provided the notice letter of the -- notice of</p> <p>9 the March 12, 2013, public hearing, correct?</p> <p>10 A. Correct.</p> <p>11 Q. The letter, the second page letter, indicates</p> <p>12 that the rezoning petition was actually enclosed and</p> <p>13 provided to the affected utilities, towns, and</p> <p>14 schools, correct?</p> <p>15 A. That's what it says, yes.</p> <p>16 Q. And your attorney Ben Comer actually invites</p> <p>17 the affected utilities, towns, and schools to contact</p> <p>18 him personally should they have any questions or</p> <p>19 concerns; do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Do you know if Mr. Comer received any</p> <p>22 questions or concerns from any of the utilities,</p> <p>23 schools, and towns that received this notice?</p> <p>24 A. I don't know off the top of my head, no.</p> <p>25 (Exhibit 30 marked.)</p>	<p style="text-align: right;">Page 161</p> <p>1 A. Yeah, I guess that's what that says, yeah.</p> <p>2 Q. But affected landowners received just 11 days'</p> <p>3 notice, likely less with mail, but given the date of</p> <p>4 the letter and the date of the hearing, they received</p> <p>5 11 days' notice, correct?</p> <p>6 A. That's what this says, yes.</p> <p>7 Q. Is there any reason why notice to landowners</p> <p>8 who actually live next to the 4/9 facility couldn't</p> <p>9 have been sent 30 days' notice as well along with the</p> <p>10 notice sent to schools and utilities?</p> <p>11 A. That's why we hired Ben to -- as the attorney</p> <p>12 to handle this matter. I'm not an attorney, I don't</p> <p>13 know the rules that he needed to follow.</p> <p>14 Q. Right. My question was is there any reason</p> <p>15 why notice couldn't have been sent at the same time to</p> <p>16 the affected landowners?</p> <p>17 A. You will have to ask him that, I don't know</p> <p>18 the answer to that.</p> <p>19 Q. To your understanding, is there any reason why</p> <p>20 mail wouldn't work for the landowners as well as to</p> <p>21 the schools if he chose to mail them on the same day?</p> <p>22 There is no reason why they couldn't have both been</p> <p>23 done on the same day?</p> <p>24 MR. BRAUN: Objection, the question has</p> <p>25 been asked and answered, the witness testified that</p>

1 the neighbors?
 2 A. Yeah.
 3 Q. Okay. And they are about .35 miles away and
 4 they are right across the street in a tenth of a mile,
 5 I'm not sure who he is referring to, but basically
 6 those two neighbors live .35 miles away and one of
 7 them lives a tenth of a mile away; is that correct?
 8 A. Mr. Asher passed away, but his house has
 9 already resold with a new neighbor living there now.
 10 MR. BRAUN: I think she is referring to
 11 back in 2013.
 12 Q. Yes.
 13 A. Sorry. Those are the two neighbors.
 14 Q. And that is the distance roughly?
 15 A. Mr. Asher was across the street and Lippards
 16 were -- yeah.
 17 Q. And apparently the Lippards who lived 20 years
 18 next to the hog operation stated that there was never
 19 any problems, rare odors that pass, and the Ashers say
 20 that you were good neighbors, stewards of the land,
 21 agriculture is an important part of Hendricks County,
 22 I'm not sure what he is referring to there, but going
 23 back to the Lippards noting that there were rare
 24 odors, do you see that?
 25 A. Yes.

1 Q. So there is -- going back to your testimony
 2 where you had no opinion that odors are inherent in
 3 livestock production, does that change your testimony?
 4 A. I don't recall the question, but that's what
 5 Lippard said -- after reading this -- I hadn't had
 6 this page memorized.
 7 Q. Well, no, I am asking you as you are reading
 8 it now, you see that they did experience rare odors;
 9 do you see that?
 10 A. Okay. Yes, I see that.
 11 Q. So your existing, the Himsel facility existing
 12 operation does occasionally emit rare odors, that's
 13 acknowledged by neighbors, correct?
 14 A. Correct.
 15 Q. It is not too far of a stretch to think that
 16 the 4/9 facility might emit some odors every once in
 17 awhile, too, correct?
 18 A. Correct.
 19 Q. If you go to Page -- it looks like 7, Page 7,
 20 we are still with Mr. Comer's comments. About midway
 21 down he describes the 4/9 Livestock, the concrete
 22 pits, and says that the waste drops down into the deep
 23 pits, the storage pits where it is collected, and then
 24 they use a suction hose type system to pull it out and
 25 inject it into nearby farm fields; do you see that?

1 A. Yes.
 2 Q. I believe you testified earlier that you and
 3 your brother and your father are not the ones that do
 4 the land application, that you contract that out?
 5 A. Correct.
 6 Q. Who do you contract that out to?
 7 A. It is an individual, his name is Jeff Reddick.
 8 Q. Further down it says, Cory Himsel, you will be
 9 living right across the street and you will be the
 10 owner/operator basically on site to manage the
 11 operation; do you see that?
 12 A. Uh-huh, yes.
 13 Q. And it doesn't say 4/9 will be the owner of
 14 the operation, it says you personally will be,
 15 correct?
 16 A. Correct, that's what it says.
 17 Q. And that you would be the one most affected by
 18 any wind flow in his direction; do you see that?
 19 A. Yes.
 20 Q. Why would -- what does Mr. Comer mean by that,
 21 if you know? What was the concern about wind flow
 22 there?
 23 A. I'm not sure what he meant by that. I'm not
 24 going to speculate what he meant. I don't know.
 25 Q. Could it be the rare odors that sometimes come

1 off of a confined animal feeding operation?
 2 MR. BRAUN: Objection, calls for
 3 speculation, witness testified he doesn't know what
 4 Mr. Comer is referring to there. Subject to that, you
 5 can answer the question.
 6 A. Yeah, I don't know.
 7 Q. Let's go to Exhibit 31 which is the other
 8 transcript where the neighbors had an opportunity to
 9 speak. We will start first with Richard Himsel. Is
 10 he your uncle or cousin?
 11 A. He would be my second cousin, I believe. He
 12 is my dad's first cousin. Dick's dad and my
 13 grandfather were brothers.
 14 Q. Okay. So going down to the bottom of the
 15 page, he is pointing to your home apparently on a map.
 16 Was there a map that was set up at the hearing that
 17 was being referred to?
 18 A. Probably similar to your Google map, if I
 19 recall right.
 20 Q. Okay. So he points out that you live right
 21 where you live and then he says that you won't have
 22 the problems he has because here is where he lives,
 23 and apparently he points there, and the wind comes out
 24 of the southwest directly across from me, he thinks
 25 that the winds in your area are from the southwest; do

Page 210	Page 212
<p>1 A. Yeah. He now lives within a half mile, 2 three-quarters of a mile away. 3 Q. But at the time he didn't? 4 A. At the time, true. 5 Q. At the time he lived in Avon? 6 A. Correct. 7 Q. Going to Eric Wornhoff -- 8 A. Yep. 9 Q. -- representative of the Hendricks County Farm 10 Bureau Board, I am assuming you know Eric Wornhoff? 11 A. Correct. 12 Q. You know him from your membership with the 13 Hendricks County Pork Producers Association? 14 A. He is also in the -- works in the agricultural 15 field. Seed specialist or seed advisor they call him. 16 Q. He states that he is wearing two hats, one 17 being representative from Indiana Hendricks County 18 Farm Bureau, which supports. I don't see where he 19 says what his other hat is. At any rate, he says 20 that, "The proposed CAFO may have a slight odor but 21 the benefits to what we are trying to do in animal 22 agri-business as well as agriculture is the only 23 sustainable way to reduce the amount of tons that 24 we're putting out of mined fertilizers." 25 Oh, here is the other hat. "The other hat I</p>	<p>1 Stanfield who lives at 2396 North Country Road West 2 425 West; do you know Daryl Stanfield? 3 A. No, I do not. 4 Q. Okay. He said he just moved in six months 5 prior to the public hearing and that had he known 6 there was a possibility of changing from agriculture 7 residential to agriculture intensive he would not have 8 purchased the house; do you see that? 9 A. Yeah, that's what he says. 10 Q. In fact, the AGR zoning district that the CAFO 11 property was would not have allowed an ag intense use 12 such as a CAFO before that property was rezoned, 13 correct? 14 A. I think according to the 2008 plan, that's why 15 they went to the rezoning process. 16 Q. Right. So when it was zoned AGR, ag 17 residential, a CAFO -- 18 A. That's why we rezoned it, had to go through 19 the rezoning process, yes. 20 Q. So he purchased six months prior to the 21 rezoning understanding that the property was AGR zoned 22 as well as other properties there and he is stating he 23 wouldn't have purchased there had he known that there 24 was a possibility of a rezone; do you see that? 25 A. Yes.</p>
Page 211	Page 213
<p>1 wear is also an animal agri-business individual that 2 raises livestock in Hendricks County." Is that 3 consistent with what you know about Eric Wornhoff? 4 A. Yes. 5 Q. And he acknowledges that your proposed CAFO 6 may have a slight odor; do you see that? 7 A. Yes, we already read that, yes. 8 Q. Do you disagree with that? 9 A. Disagree with his statement. 10 Q. Uh-huh, yes. 11 A. Yes or no? I disagree -- I didn't hear what 12 you said. It confused me. 13 Q. It is getting to be late. My question is do 14 you disagree with his comment that your proposed CAFO 15 would have a slight odor? 16 A. I don't disagree with him. 17 Q. You agree that manure does produce odor? 18 A. Yes. 19 Q. He lives at 3538 West County Road 100 South; 20 how far away is that from the proposed site? 21 A. He is probably five miles, I guess. 22 Q. So not -- his property would not be impacted 23 one way or another, correct? 24 A. Correct. 25 Q. Going to Page 11 to the comments of Daryl</p>	<p>1 Q. Did that cause you to be concerned that there 2 was an individual who felt that they had purchased 3 something that wasn't what they thought they were 4 purchasing? 5 A. I think it was my understanding that they 6 would have known that if they read the comprehensive 7 plans that this was possible when they bought the 8 place. We just, like I said, referred to the people 9 we hired, consultants, and went that course. 10 (Exhibit 34 marked.) 11 Q. This is 34. I am showing you Exhibit 34 which 12 is the 2008 -- well, the cover and several pages of 13 the 2008 Hendricks County Zoning Ordinance. If you 14 can turn to Page 4-1 under the Zoning Districts 15 Established, Establishment of Districts, you see that 16 there are three agricultural districts there, correct? 17 A. Correct. 18 Q. One is AGB or agricultural business district, 19 one is AGI, agriculture intense district, and the 20 other is AGR, agriculture residential district. Do 21 you see that? 22 A. Uh-huh, yes. 23 Q. And the property where the CAFO is was rezoned 24 from AGR to AGI, correct? 25 A. Correct.</p>

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<p>1 Q. If you turn to the next page, Page 4-2, there</p> <p>2 is under 4.2 Zoning District Transition, there is a</p> <p>3 table that shows what the zoning of properties were</p> <p>4 prior to the 2008 zoning ordinance and what they were</p> <p>5 transferred into post-enactment of the 2008 ordinance.</p> <p>6 Do you see that table? It is Table 4.1, Agricultural</p> <p>7 and Residential Transitional Districts. Do you see</p> <p>8 that?</p> <p>9 A. Yes.</p> <p>10 Q. So next to AGI on the right, it is a newly</p> <p>11 established zoning district, you see to the left that</p> <p>12 it's a new zoning district, it didn't exist before the</p> <p>13 2008 zoning ordinance was enacted; do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. And then next to AGR it shows that it had</p> <p>16 previously been a rural residential district; do you</p> <p>17 see that?</p> <p>18 A. Yes.</p> <p>19 Q. So that means that the property where the CAFO</p> <p>20 was constructed prior to 2008 was actually zoned RA,</p> <p>21 Rural Residential, and then after the 2008 zoning</p> <p>22 ordinance was enacted it became AGR, or agricultural</p> <p>23 residential, correct?</p> <p>24 A. Correct.</p> <p>25 Q. Then if you go to Page 4-5 at the top left</p>	<p>1 the properties were zoned AGR and CAFOs were not</p> <p>2 permitted in those districts, correct?</p> <p>3 A. Correct.</p> <p>4 Q. Okay. If you could turn to the next page,</p> <p>5 4-15, it talks about the district intent of the AGI,</p> <p>6 agriculture intense district. It says it serves to</p> <p>7 provide adequate and appropriate locations for intense</p> <p>8 agricultural uses such as CAFOs or agricultural</p> <p>9 businesses that may emit intense odors, vibrations,</p> <p>10 air pollution, or other disruptions. The intention is</p> <p>11 to protect both the agricultural use and residential</p> <p>12 and commercial property owners from nuisance claims.</p> <p>13 Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. So what you rezoned your property for was to</p> <p>16 allow for a development that the county, at least as</p> <p>17 of 2008, recognized might emit intense odors,</p> <p>18 vibrations, and air pollution, correct?</p> <p>19 A. Correct.</p> <p>20 Q. That's consistent with what the National Pork</p> <p>21 Board was saying back in 1999, isn't it?</p> <p>22 A. We have already gone over that today, right?</p> <p>23 Q. Yeah.</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And the intent was to protect</p>
Page 215	Page 217
<p>1 corner, it explains that Table 4.3 demonstrates</p> <p>2 permitted and special exception land uses where P</p> <p>3 equals permitted uses, and special exception, S equals</p> <p>4 special exception uses in those districts; do you see</p> <p>5 that?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Looking at the AGR column, if you go</p> <p>8 down to CAFO and CFO, there is no P and no S, are</p> <p>9 there?</p> <p>10 A. In the AGR?</p> <p>11 Q. Yes.</p> <p>12 A. No.</p> <p>13 Q. Meaning it is not a permitted use or even a</p> <p>14 special exception use in the AGR district, correct?</p> <p>15 CAFOs would not be permitted in the AGR district?</p> <p>16 A. Not after 2008, no.</p> <p>17 Q. Or prior to RA, the AGI district didn't even</p> <p>18 exist, correct?</p> <p>19 A. Okay, yes.</p> <p>20 Q. But then AGI, that's where CAFOs are permitted</p> <p>21 as denoted by a P?</p> <p>22 A. Yes.</p> <p>23 Q. So at least when going back to the concerns of</p> <p>24 Mr. Stanfield, what he was referring to is that he had</p> <p>25 moved there six months previously and noted that all</p>	<p>1 residential and commercial property owners from</p> <p>2 nuisance claims, do you see that?</p> <p>3 A. I see it.</p> <p>4 Q. The claims brought against you and your father</p> <p>5 and your brother and 4/9 and Co-Alliance, part of that</p> <p>6 is a nuisance claim for odors and air pollution</p> <p>7 impacting your neighbors, isn't it?</p> <p>8 A. That's what the claims are, yes.</p> <p>9 Q. So essentially by rezoning you put a</p> <p>10 development amid surrounding properties that every</p> <p>11 expectation to not have to deal with these odors and</p> <p>12 air emissions, didn't you?</p> <p>13 MR. BRAUN: Objection, misstates the</p> <p>14 district's intent on 4.6. Subject to that, you can</p> <p>15 answer the question.</p> <p>16 A. We relied on our counsel, Ben Comer, other</p> <p>17 expert testimony or expert consultants, and then the</p> <p>18 board to decide whether that was permitted use in that</p> <p>19 area to be rezoned.</p> <p>20 Q. You can turn to the next page, Page 4-17, and</p> <p>21 this is the district intent and other information</p> <p>22 about the AGR zone district, and I want to draw your</p> <p>23 attention to the notes section, there is a square in</p> <p>24 the middle of the page, Item Number 2 there, it says</p> <p>25 "Some uses in this district may be required to sign</p>

1 Q. Okay. So this is overestimating then or --
 2 A. Could be.
 3 Q. What do you base your opinion that you think
 4 the hogs produce less annually?
 5 A. Just our pits have never filled up to capacity
 6 even after that first year they weren't full for one
 7 whole year. A lot of times what you don't take into
 8 consideration is this number could be for, okay, let's
 9 say 8,000 pigs that are in there that never leave.
 10 Well, by the time you sell and you get the barn sits
 11 empty for a couple weeks in the spring and a couple
 12 weeks in the fall, there's a month, so I mean that's
 13 what I am basing my opinion that we have less than
 14 that number.
 15 Q. Sure. Is there a reason why manure is removed
 16 just twice a year as opposed to once a month or once a
 17 week?
 18 A. That's just not feasible to do it.
 19 Q. Why not?
 20 A. You don't have anywhere to go with it because
 21 there is crops in the ground.
 22 Q. Okay. Even in the winter -- well, I guess you
 23 can't --
 24 A. You can't, they don't want you doing it in the
 25 winter.

1 Q. I wouldn't want you doing it in the winter
 2 either.
 3 MS. FERRARO: I think that's all I have.
 4 MR. BRAUN: I don't have any questions.
 5 We would like to read and sign.
 6
 7 (Proceedings adjourned at 5:25 p.m.)
 8
 9
 10 AND FURTHER DEPONENT SAITH NOT
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 15 _____
 16 (Signature of witness above
 17 Subject to any notations on
 18 Errata Sheet)
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1 STATE OF INDIANA)
 2) Ss:
 3 COUNTY OF BOONE)
 4
 5 I, Heather S. Orbaugh, the undersigned Court
 6 Reporter and Notary Public residing and maintaining
 7 offices in the City of Zionsville, Boone County,
 8 Indiana, do hereby certify:
 9
 10 That at the time and place described above in
 11 this transcript, the witness was presented before me
 12 for administration of an oath of truthfulness which
 13 oath I then administered;
 14 That I then reported to the best of my ability in
 15 machine shorthand all of the words spoken by all
 16 parties in attendance during the course of the ensuing
 17 proceedings, including objections, if any, made by all
 18 counsel present;
 19 That I later reduced my shorthand notes into the
 20 foregoing typewritten transcript form, which
 21 typewritten transcript is a true record to the best of
 22 my ability of the testimony given by the witness as
 23 stated above;
 24 That I am not a relative or employee or attorney
 25 or counsel of any of the parties, nor am I a relative
 or an employee of such attorney or counsel, and that I
 am not financially interested in this action.
 IN WITNESS HERETO, I have affixed my Notarial Seal
 and subscribed my signature below this ____ day of
 _____, 2016.

 Notary Public
 County of Residence: Boone (Seal)
 My Commission Expires on: April 27, 2017

1 STATE OF INDIANA)
) ss:
2 COUNTY OF BOONE)

3
4 I, Heather S. Orbaugh, the undersigned Court Reporter
5 and Notary Public residing and maintaining offices in the
6 City of Zionsville, Boone County, Indiana, do hereby certify:

7 That at the time and place described above in this
8 transcript, the witness was presented before me for
9 administration of an oath of truthfulness which oath I then
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11 That I then reported to the best of my ability in
12 machine shorthand all of the words spoken by all parties in
13 attendance during the course of the ensuing proceedings,
14 including objections, if any, made by all counsel present;

15 That I later reduced my shorthand notes into the
16 foregoing typewritten transcript form, which typewritten
17 transcript is a true record to the best of my ability of the
18 testimony given by the witness as stated above;

19 That I am not a relative or employee or attorney or
20 counsel of any of the parties, nor am I a relative or an
21 employee of such attorney or counsel, and that I am not
22 financially interested in this action.

23
24 IN WITNESS HERETO, I have affixed my Notarial Seal and
25 subscribed my signature below this 26th day of September,
2016.

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**CERTIFICATE OF NOTARY AS TO
FAILURE OF WITNESS TO SIGN TRANSCRIPT
WITHIN TIME ALLOWED BY TRIAL RULES**

I hereby certify that HEATHER S. ORBAUGH, a Notary Public in and for the
County of BOONE, State of Indiana, administered an oath at the deposition of CORY
M. HIMSEL on the 6TH day of SEPTEMBER, 2016;

That said deposition transcript was made available to the witness for reviewing
and signing under the applicable rules of procedure;

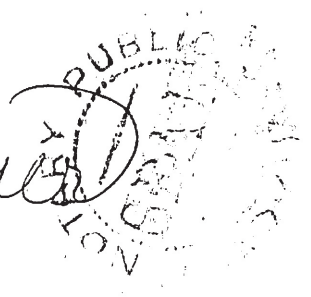
That the original transcript was either/or

- ☐ RETURNED UNSIGNED
☐ RETAINED BY THE WITNESS
☒ WITNESS FAILED TO SIGN WITHIN TIME PERIOD ALLOWED UNDER RULES.
☐ OTHER EXPLANATION GIVEN _____

We are therefore filing this original unsigned transcript on this 20TH day of
JANUARY, 20 17.


LINDA M. BOUR, NOTARY PUBLIC

County of Residence: MARION
Commission Expires: JUNE 19, 2024



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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">A P P E A R A N C E S</p> <p>FOR ALL PLAINTIFFS: KIM E. FERRARO HOOSIER ENVIRONMENTAL COUNSEL 407 EAST LINCOLNWAY SUITE A VALPARAISO, IN 46383 (219) 464-0104 (PHONE) kferraro@hecweb.org</p> <p>FOR ALL DEFENDANTS: CHRISTOPHER J. BRAUN PLEWS SHADLEY RACHER & BRAUN, LLP 1346 NORTH DELAWARE STREET INDIANAPOLIS, IN 46202 (317) 637-0711 (PHONE) cbraun@psrb.com</p> <p>FOR THE DEFENDANT: BRANDON W. EHRIE (SAMUEL T. HIMSEL, LEWIS WAGNER, LLP Personally) 501 INDIANA AVENUE SUITE 200 INDIANAPOLIS, IN 46202 (317) 237-0500 (PHONE) behrie@lewiswagner.com</p> <p>ALSO PRESENT: SAMUEL T. HIMSEL (until 12:25 p.m.)</p>	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;"><< CONFIDENTIAL / UNDER PROTECTIVE ORDER >> I_N_D_E_X_O_F_E_X_H_I_B_I_T_S</p> <p>Deposition Exhibit No(s).:</p> <p>** (Denotes exhibits marked in another deposition.)</p> <p style="text-align: center;">PAGES</p> <p>1 - Co-Alliance, LLP Hog Finishing Contract (signed w/ attachments). 20 2 - Individual Himsel Defendants' Responses and Objections to Plaintiffs' Amended First Set of Interrogatories..... / 3 - Letter of Intent..... / 4 - Nationwide Agribusiness Insurance Policy..... / 5 - Co-Alliance, LLP Board Meeting Minutes (03/28/13)..... / 6 - Handwritten Notes..... / 7 - Letter from Kruse Consulting regarding Application for AGI Development (03/05/13)..... / 8 - Manure Land Use Agreement dated 12/17/12..... 45 9 - Indiana Business Entity Report... / 10 - Operating Agreement of 4/9 Livestock, LLC..... 49 11 - Hastings Mutual Insurance Company Amended Declaration effective 10/01/14 through 10/01/15..... / 12 - Hastings Mutual Insurance Company Renewal Declaration effective 10/01/15 through 10/01/16..... / 13 - Hastings Mutual Insurance Company Amended Declaration effective 10/01/13 through 10/01/14..... / 14 - Google Earth Map..... / 15 - Individual Himsel Defendants' Amended Responses and Objections to Plaintiffs' Amended First Set of Interrogatories..... 28</p>
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">I_N_D_E_X_O_F_E_X_A_M_I_N_A_T_I_O_N</p> <p style="text-align: center;">(MORNING SESSION)</p> <p style="text-align: center;">PAGES</p> <p>DIRECT EXAMINATION..... 9 QUESTIONS BY MS. KIM E. FERRARO</p> <p>DIRECT EXAMINATION (Continuing)..... 58 QUESTIONS BY MS. KIM E. FERRARO</p> <p>DIRECT EXAMINATION (Continuing)..... 86 QUESTIONS BY MS. KIM E. FERRARO</p> <p>DIRECT EXAMINATION (Continuing)..... 109 QUESTIONS BY MS. KIM E. FERRARO</p> <p style="text-align: center;">(AFTERNOON SESSION)</p> <p style="text-align: center;">PAGES</p> <p>DIRECT EXAMINATION (Continuing)..... 120 QUESTIONS BY MS. KIM E. FERRARO</p> <p>DIRECT EXAMINATION (Continuing)..... 161 QUESTIONS BY MS. KIM E. FERRARO</p> <p>DIRECT EXAMINATION (Continuing)..... 187 QUESTIONS BY MS. KIM E. FERRARO</p> <p>DIRECT EXAMINATION (Continuing)..... 218 QUESTIONS BY MS. KIM E. FERRARO</p>	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;"><< CONFIDENTIAL / UNDER PROTECTIVE ORDER >> I_N_D_E_X_O_F_E_X_H_I_B_I_T_S (CONTINUING)</p> <p>Deposition Exhibit No(s).:</p> <p>** (Denotes exhibits marked in another deposition.)</p> <p style="text-align: center;">PAGES</p> <p>16 - Co-Alliance Letter in Support of Request for Zoning Change dated 02/05/13..... / 17 - National Pork Board & National Pork Producers Council (History). / 18 - Revenue Expenditures (2008)..... / ** 19 - PQA Plus Certification Manual.... 239 20 - Pork Issues Handbook (1999/2000). / ** 21 - Free On-Farm Odor Assessments.... 244 22 - Factsheet - Environmental for the Pork Industry..... / ** 23 - Siting and Building Design Considerations to Reduce Odor Potential from Swine Facilities.. 241 24 - Wind Frequency Table (percentage) Indianapolis, IN..... / ** 25 - Mitigating Manure's Odor..... 245 ** 26 - 10 Steps to Manage Odor..... 244 ** 27 - Methods and Practices to Reduce Odor from Swine Facilities..... 252 28 - National Pork Producers Council CERCLA-EPCRA Fact Sheet 01/24/09. / 29 - Affidavit of Notice of Public Hearing of Hendricks County Planning Commission..... / 30 - Letter from Ben Comer dated 03/01/13 to Landowners regarding Letter of Intent to apply for AGI Zoning District..... /</p>

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<p>1 self-employment?</p> <p>2 A. How long have I been raising crops on my own?</p> <p>3 Since 2005 -- or since I graduated college, so it</p> <p>4 would be --</p> <p>5 Q. And to the present time?</p> <p>6 A. Yes.</p> <p>7 Q. Is it fair to say that your profession</p> <p>8 postgraduation from college has been spent in</p> <p>9 farming?</p> <p>10 A. Yes.</p> <p>11 Q. And fair to say that your life's profession has a</p> <p>12 specific focus of raising livestock, or is it a</p> <p>13 combination of both raising crops and livestock?</p> <p>14 A. I would say both.</p> <p>15 Q. Do you have a percentage? You think you have more</p> <p>16 of a focus in one versus the other?</p> <p>17 A. I'd say 50/50.</p> <p>18 Q. The livestock that you've raised, is there a</p> <p>19 particular type of animal that you're mostly</p> <p>20 engaged in raising?</p> <p>21 A. Hogs.</p> <p>22 Q. And have you ever raised any other livestock?</p> <p>23 A. I have not.</p> <p>24 Q. Himsel Brothers Farm that you work for, who is</p> <p>25 that owned by?</p>	<p>1 but it's your understanding that that contract was</p> <p>2 entered on July 1st, 2013, correct?</p> <p>3 A. The Co-Alliance contract (indicating)?</p> <p>4 Q. Yes.</p> <p>5 A. For the 4/9?</p> <p>6 Q. Yes.</p> <p>7 A. I believe that -- I believe that the dates --</p> <p>8 Q. Feel free to --</p> <p>9 A. -- are probably correct.</p> <p>10 Q. You can look at the documents if you don't recall.</p> <p>11 This would be I believe Exhibit Number 1.</p> <p>12 THE WITNESS: Where's the date at?</p> <p>13 MR. BRAUN: Should be --</p> <p>14 THE WITNESS: Back?</p> <p>15 MR. BRAUN: Go to Page 7.</p> <p>16 THE WITNESS: (Complies with request).</p> <p>17 MR. BRAUN: At the bottom.</p> <p>18 A. Yes, July 1st.</p> <p>19 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>20 Q. 2013?</p> <p>21 A. 2013, yes.</p> <p>22 Q. And who are the signatories on the contract?</p> <p>23 A. Myself, Sam, Cory and Dewey Bucher.</p> <p>24 Q. Dewey Bucher is with Co-Alliance?</p> <p>25 A. Yes.</p>
Page 19	Page 21
<p>1 A. It would be my dad and my two uncles.</p> <p>2 Q. Your two uncles are David Himsel and Stephen</p> <p>3 Himsel?</p> <p>4 A. Correct.</p> <p>5 Q. And your brother testified yesterday I believe</p> <p>6 that Himsel Brothers started in the late '70s; is</p> <p>7 that correct?</p> <p>8 A. I believe so.</p> <p>9 Q. No reason to disagree?</p> <p>10 A. I don't disagree, no.</p> <p>11 Q. Okay. In your --</p> <p>12 MS. FERRARO: Strike that.</p> <p>13 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>14 Q. Himsel Brothers began raising hogs for Co-Alliance</p> <p>15 sometime in 2004, 2005, I believe is what he</p> <p>16 testified to yesterday.</p> <p>17 A. I believe that's right.</p> <p>18 Q. I think we also learned yesterday that your uncle,</p> <p>19 David Himsel, is on the Co-Alliance Board of</p> <p>20 Directors?</p> <p>21 A. Correct.</p> <p>22 Q. And has been so for 20 years?</p> <p>23 A. (Witness shrugs), as far as I know, yeah.</p> <p>24 Q. We'll get into talking about the Hog Production</p> <p>25 Contract that 4/9 has with Co-Alliance later on,</p>	<p>1 Q. Whose idea was it to enter into the Hog Production</p> <p>2 Contract with Co-Alliance?</p> <p>3 A. Whose idea?</p> <p>4 Q. Yes.</p> <p>5 A. Myself, my brother and my dad.</p> <p>6 Q. Why did you decide to enter into this contract</p> <p>7 with Co-Alliance?</p> <p>8 A. Can you re -- reask that?</p> <p>9 Q. Sure. Why did you -- why did you and your father</p> <p>10 and your brother decide to enter into the Hog</p> <p>11 Production -- Hog Production Contract with</p> <p>12 Co-Alliance?</p> <p>13 A. It was -- it would be 4/9 Livestock actually the</p> <p>14 contract is under, I guess.</p> <p>15 MR. BRAUN: I think she's asking just</p> <p>16 generally.</p> <p>17 A. Just to raise more pigs and another way of a</p> <p>18 income for future generations.</p> <p>19 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>20 Q. When you say to raise more pigs, would that be to</p> <p>21 raise more pigs for Himsel Brothers?</p> <p>22 A. No, for 4/9.</p> <p>23 Q. But at the time you had decided to enter into this</p> <p>24 contract, 4/9 had not been established yet,</p> <p>25 correct?</p>

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<p>1 A. When we signed the contract?</p> <p>2 Q. No, when a first decision that "We're going to do</p> <p>3 this."</p> <p>4 A. Oh, that we're going to do it?</p> <p>5 Q. Yes.</p> <p>6 A. Correct, but -- but it had -- it wouldn't have had</p> <p>7 anything to do with Himsel Brothers because me and</p> <p>8 Cory had no interest in -- and the Himsel</p> <p>9 Brothers, that's my dad, and there are two uncles,</p> <p>10 so that --</p> <p>11 Q. Maybe -- I might have asked a confusing question.</p> <p>12 You said that "We did this to raise more pigs."</p> <p>13 And so if you're not doing -- raising more pigs</p> <p>14 for --</p> <p>15 A. Oh.</p> <p>16 Q. -- Himsel Brothers, who would you be raising more</p> <p>17 pigs for?</p> <p>18 A. So I stated it wrong, I'm sorry.</p> <p>19 Q. That's okay. I just want to make sure we're clear</p> <p>20 on questions and answers. Go ahead, please</p> <p>21 read -- please answer that question.</p> <p>22 A. So we wanted to raise pigs I guess together as me,</p> <p>23 Sam and Cory.</p> <p>24 Q. Separate and apart from Himsel Brothers?</p> <p>25 A. Correct.</p>	<p>1 to say? We just -- I'm sorry, I'm --</p> <p>2 Q. That's okay, take your time.</p> <p>3 A. -- tongue-tied. It was just something that we --</p> <p>4 we wanted to do, I guess. I don't really recall</p> <p>5 exactly what the conversation was.</p> <p>6 Q. At some unknown point in time you all just decided</p> <p>7 "We want to raise hogs separately from Himsel</p> <p>8 Brothers", fair?</p> <p>9 A. That would be correct, yes.</p> <p>10 Q. And do you know generally when that happened, this</p> <p>11 conversation among the three of you prior to your</p> <p>12 brother calling Kevin Still?</p> <p>13 A. When was it? I don't recall the exact date, I</p> <p>14 guess.</p> <p>15 Q. Generally. Month and year? Approximate --</p> <p>16 approximate time?</p> <p>17 A. I guess it would have been 2012, October or</p> <p>18 November area maybe; I -- I'm not exact on that.</p> <p>19 Q. Had anything -- had your employment at Himsel</p> <p>20 Brothers Farms changed that prompted this idea to</p> <p>21 start a new LLC or a new business to raise hogs?</p> <p>22 A. No.</p> <p>23 Q. Had -- is there some new information that you had</p> <p>24 gleaned from Co-Alliance or some other source</p> <p>25 about this being an opportunity to -- that you</p>
Page 23	Page 25
<p>1 Q. And I believe your brother testified yesterday</p> <p>2 that Himsel Brothers has a Hog Production Contract</p> <p>3 with Co-Alliance?</p> <p>4 A. Yes.</p> <p>5 Q. And has had one since 2004 or 2005 time frame?</p> <p>6 A. I believe that's correct.</p> <p>7 Q. Who initiated the conversation over -- whether it</p> <p>8 be Co-Alliance with you, Sam and Cory, I'm going</p> <p>9 to get your two names mixed up today, my</p> <p>10 apologies -- or whether it was you, Sam or Cory</p> <p>11 contacted Co-Alliance, who initiated that?</p> <p>12 A. I believe Cory initiated it.</p> <p>13 Q. Did he speak with you or your father before</p> <p>14 initiating that contact?</p> <p>15 A. I believe we -- we had talked about it prior to</p> <p>16 that, so not in any detail. And then I believe he</p> <p>17 talked to, oh, Kevin Still after -- after we</p> <p>18 talked a little bit.</p> <p>19 Q. Can you tell me generally what the conversation</p> <p>20 among the three of you -- you, Sam and Cory -- was</p> <p>21 before you decided to reach out to Kevin Still?</p> <p>22 A. As I -- I mean from what I recall, it would just</p> <p>23 be something that we were trying to differentiate</p> <p>24 our -- ourselves or just another avenue. I don't</p> <p>25 know how to explain it, I guess. What am I trying</p>	<p>1 might want to take advantage of?</p> <p>2 A. Not that I recall.</p> <p>3 Q. Just out of the blue, you guys decided this was</p> <p>4 something you wanted to do?</p> <p>5 A. Yes.</p> <p>6 Q. You said that your brother Cory contacted Kevin</p> <p>7 Still --</p> <p>8 A. Correct.</p> <p>9 Q. -- about this. Were you present for that</p> <p>10 conversation?</p> <p>11 A. No, I was not.</p> <p>12 Q. Are you aware of what was said during that</p> <p>13 conversation?</p> <p>14 A. Just the general; we told him that we -- we might</p> <p>15 be interested in building some buildings and just</p> <p>16 wanted to see if it was going to be feasible</p> <p>17 for -- or if Co-Alliance would want to supply us</p> <p>18 pigs or if we could get a contract similar to what</p> <p>19 Himsel Brothers has.</p> <p>20 Q. Did you reach out to any other cooperative,</p> <p>21 integrator, company, about them supplying pigs to</p> <p>22 the buildings you wanted to build?</p> <p>23 A. No.</p> <p>24 Q. Just Co-Alliance?</p> <p>25 A. (Affirmative nod).</p>

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<p>1 Q. How do you know that they --</p> <p>2 MS. FERRARO: Strike that. Well actually</p> <p>3 don't strike that.</p> <p>4 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>5 Q. How did you know that they would even be</p> <p>6 interested in something like this?</p> <p>7 A. Well Himsel Brothers has contracted with them and</p> <p>8 that's why we asked them if they would be</p> <p>9 interested.</p> <p>10 Q. We talked about earlier how that your uncle, David</p> <p>11 Himsel, is on the Board of Co-Alliance and also is</p> <p>12 an owner of Himsel Brothers Farms. Did he</p> <p>13 facilitate this communication in any way?</p> <p>14 MR. SAMUEL HIMSEL: (Negative nod).</p> <p>15 A. For --</p> <p>16 MS. FERRARO: And I want to note for the</p> <p>17 record that Sam Himsel is shaking his head no at</p> <p>18 you. Just I want to make sure that there is no</p> <p>19 communication off the record.</p> <p>20 A. Can you restate that?</p> <p>21 MR. BRAUN: Just sit.</p> <p>22 THE WITNESS: Okay, I'll --</p> <p>23 MS. FERRARO: Just wanted to clarify for</p> <p>24 the record.</p> <p>25 A. Can you reask that question?</p>	<p>1 we don't struggle with this the rest of the day.</p> <p>2 I understand 4/9 Livestock is the LLC that you,</p> <p>3 your father and your brother created, and you are</p> <p>4 the three members of that --</p> <p>5 A. (Affirmative nod).</p> <p>6 Q. -- LLC, but can we agree that 4/9 Livestock is not</p> <p>7 a person?</p> <p>8 A. I would agree, yes.</p> <p>9 Q. Okay. So as an LLC that's not a person, it can</p> <p>10 only act through its members, correct?</p> <p>11 A. Correct.</p> <p>12 Q. So when we're talking about you, your -- your</p> <p>13 father and your brother acting or making</p> <p>14 decisions, I understand that you created the LLC,</p> <p>15 but you are acting as individuals as well on</p> <p>16 behalf of the LLC.</p> <p>17 A. On behalf, okay.</p> <p>18 Q. Let's see. I think you have in front of you</p> <p>19 Exhibit 15.</p> <p>20 MS. FERRARO: Are they in order?</p> <p>21 MR. BRAUN: It looks like this</p> <p>22 (indicating), marked at the bottom there.</p> <p>23 THE WITNESS: Yeah. I will turn that</p> <p>24 over.</p> <p>25 MR. BRAUN: That's it.</p>
Page 27	Page 29
<p>1 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>2 Q. Yes. Did your uncle, David Himsel -- who was also</p> <p>3 an owner of Himsel Brothers -- facilitate any of</p> <p>4 the communication between you, your father and</p> <p>5 your brother with Co-Alliance?</p> <p>6 A. No.</p> <p>7 Q. So you -- I think we've established that the</p> <p>8 initial conversation with Co-Alliance was sometime</p> <p>9 in November of 2012. When in relation to that --</p> <p>10 whether it was during the initial conversation or</p> <p>11 some other time -- was it decided that 8,000 hogs,</p> <p>12 that particular number, would be raised?</p> <p>13 A. I don't know.</p> <p>14 Q. Do you know who made that determination?</p> <p>15 A. It's been several years. No, I don't recall who.</p> <p>16 Q. Would Co-Alliance have said: This is the number</p> <p>17 of hogs that we would like for you to raise for us</p> <p>18 as a contract owner?</p> <p>19 A. I don't know about that either. I don't -- I</p> <p>20 don't remember.</p> <p>21 Q. Okay. Do you know who decided the type of</p> <p>22 building would be constructed?</p> <p>23 A. It would be me, Sam and Cory did -- or -- or</p> <p>24 4/9 Livestock did, I guess, actually.</p> <p>25 Q. All right. Let's -- let's just make this clear so</p>	<p>1 THE WITNESS: Yeah.</p> <p>2 MR. BRAUN: Let's set those here, try to</p> <p>3 keep them in order. Oh, that -- you got one?</p> <p>4 THE WITNESS: This is the one.</p> <p>5 MR. BRAUN: Okay, good.</p> <p>6 A. Okay, all right.</p> <p>7 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>8 Q. All set?</p> <p>9 A. Yes.</p> <p>10 Q. Do you recognize this document?</p> <p>11 A. Yes.</p> <p>12 Q. Can you state for the record what this document</p> <p>13 is?</p> <p>14 A. It's the individual Himsel Defendants' Amended</p> <p>15 Responses and Objections to Plaintiffs' Amended</p> <p>16 First Set of Interrogatories.</p> <p>17 Q. And going to the back page, you -- I see you've</p> <p>18 signed this document, correct?</p> <p>19 A. Yes.</p> <p>20 Q. And there's a verification above your signature</p> <p>21 stating that you've signed under penalties of</p> <p>22 perjury that the foregoing answers in this</p> <p>23 document are true and correct to the best of your</p> <p>24 belief and knowledge, correct?</p> <p>25 A. Correct.</p>

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<p>1 Q. If you can turn to Page 13?</p> <p>2 A. (Witness complies).</p> <p>3 MS. FERRARO: And we clarified for the</p> <p>4 record yesterday that there was a little bit of a</p> <p>5 confusing typo with respect to Interrogatory --</p> <p>6 with respect to the individual Himself Defendants'</p> <p>7 Answer to Interrogatory Number 12. Do you want to</p> <p>8 make for the record again today --</p> <p>9 MR. BRAUN: Yeah, thank you. On Page 12</p> <p>10 of Exhibit 15 there is an Interrogatory Number 12,</p> <p>11 the answer to which continues on the bottom of</p> <p>12 Page 12, all of Page 13, and carries onto the top</p> <p>13 of Page 14 through and including the sentence that</p> <p>14 ends "Indiana's Confined Feeding Programs",</p> <p>15 (period).</p> <p>16 And then the Interrogatory Number 13</p> <p>17 picks up with the "Please identify any and all</p> <p>18 agricultural professional organizations",</p> <p>19 et cetera. So that what you see at the bottom of</p> <p>20 Page 13, top of 14, is all part of the Answers to</p> <p>21 Interrogatory Number 12, (indicating).</p> <p>22 MS. FERRARO: Thank you.</p> <p>23 MR. BRAUN: Thank you.</p> <p>24 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>25 Q. So you state in your Answer to Interrogatory</p>	<p>1 Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. I'm going to refer to those as the siting</p> <p>4 documents just for ease of reference. Could you</p> <p>5 review those factors and let me know when you're</p> <p>6 finished?</p> <p>7 A. (Witness complies). Okay.</p> <p>8 Q. Are there any other factors that you and your</p> <p>9 father and your brother considered that are not</p> <p>10 listed here?</p> <p>11 A. I think they're all listed.</p> <p>12 Q. So fair to say that prevailing wind directions in</p> <p>13 the area was not considered?</p> <p>14 A. No.</p> <p>15 Q. And also fair to say that a verified computer</p> <p>16 model for assessing potential off-site odor and</p> <p>17 air emissions impact was not used to determine</p> <p>18 appropriate setbacks from neighboring residential</p> <p>19 properties, correct?</p> <p>20 A. Not that I'm aware of.</p> <p>21 Q. You also state that these factors were considered</p> <p>22 without identifying who actually considered them.</p> <p>23 Did you, your father and brother consider these</p> <p>24 factors, or did someone else consider them on your</p> <p>25 behalf?</p>
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<p>1 Number 12 that "4/9 Livestock is owned by Cory</p> <p>2 Himself, Clint Himself and Sam Himself and that 4/9</p> <p>3 Livestock consulted with and/or relied on various</p> <p>4 persons and entities in making the decision to</p> <p>5 site and build the 4/9 CAFO at its existing</p> <p>6 location." Do you see that?</p> <p>7 A. Yep.</p> <p>8 Q. And as we talked about before, 4/9 is not a</p> <p>9 person, it's a business entity, correct?</p> <p>10 A. Correct.</p> <p>11 Q. And as a business entity, it can only act through</p> <p>12 its employees, agents or members such as you, Sam</p> <p>13 and Cory, correct?</p> <p>14 A. Yes.</p> <p>15 Q. And you testified earlier that you, Cory and Clint</p> <p>16 (sic) together made the decision to site and build</p> <p>17 the CAFO at its current location, correct?</p> <p>18 A. Yes.</p> <p>19 MS. FERRARO: Too many documents I've put</p> <p>20 in here.</p> <p>21 QUESTIONS CONTINUING BY MS. FERRARO:</p> <p>22 Q. Also in your Answer to Interrogatory Number 12 you</p> <p>23 state that a number of factors were considered in</p> <p>24 making the decision to site the 4/9 CAFO at its</p> <p>25 current location, and then you list those factors.</p>	<p>1 A. I would say both.</p> <p>2 Q. Could you tell me which factors you, your father</p> <p>3 and brother considered versus those factors that</p> <p>4 others considered?</p> <p>5 A. The status of the existing -- of the existing</p> <p>6 feeding operations that would be like the distance</p> <p>7 from other hog facilities for health reasons;</p> <p>8 having land close to it, nearby that we can apply</p> <p>9 fertilizer to. I believe those --</p> <p>10 Q. Those status of other feeding operations for</p> <p>11 health of the animals, I believe you said, and</p> <p>12 correct me if I'm wrong --</p> <p>13 A. Correct.</p> <p>14 Q. -- if I'm saying something wrong, and having</p> <p>15 available land to apply manure?</p> <p>16 A. Correct.</p> <p>17 Q. Did I miss -- I feel like you said three, but --</p> <p>18 A. I said the fertilizer, but you said manure, but</p> <p>19 yes.</p> <p>20 Q. So those are the two that you, your brother and</p> <p>21 your father considered?</p> <p>22 A. Correct.</p> <p>23 Q. And the other factors were considered by somebody</p> <p>24 else, correct?</p> <p>25 A. Let me make sure I got everything.</p>

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<p>1 Q. Okay. Do you recall ever being told by Dan Kinker 2 or any other consultant as to whether IDEM 3 regulations have any requirements for limiting 4 emissions of odors or air pollutants from CAFOs? 5 A. I have no knowledge of ever hearing, no. 6 THE WITNESS: Excuse me. 7 QUESTIONS CONTINUING BY MS. FERRARO: 8 Q. Aside from your consultants, have you ever heard 9 that from anyone else? 10 A. Repeat that again. 11 Q. Sure. Have you in your learning about IDEM 12 regulations and what the requirements are, have 13 you ever learned as to whether or not those 14 regulations would limit or are designed to limit 15 odors and air pollutants from CAFOs? 16 A. Not that I know of, no. 17 Q. If you had known that at the time that you were 18 considering constructing the CAFO, if you had 19 known that the IDEM regulations do not limit odors 20 and air emissions from CAFOs, would that have 21 factored in your decision-making in any way? 22 A. No. 23 Q. Why not? 24 A. Why not that they don't -- there's no regulations 25 against air?</p>	<p>1 Q. Sure, I'll do that. I'll try to make it simpler. 2 A. It's kind of confusing. 3 Q. Yeah, I do that a lot. 4 So you relied on your consultants to help 5 you navigate and comply with the IDEM regulations, 6 correct? 7 A. Correct. 8 Q. Okay. Assuming that those regulations do not 9 apply, or limit odors and air emissions from 10 CAFOs, had you known that at the time you were 11 learning about IDEM requirements in deciding where 12 to locate your CAFO, had you known that, would 13 that have changed your personal decision-making 14 about where to locate the CAFO? 15 MR. BRAUN: I'll object to the form of 16 the question with the double negative. 17 Subject to that, you can -- you may 18 answer the question. 19 A. It's -- no, no, it would not because we -- we -- 20 we depended on our experts to help us make the 21 decision, so -- 22 QUESTIONS CONTINUING BY MS. FERRARO: 23 Q. Okay. So odors and air emissions to you were not 24 a factor? Odor and air emissions impact -- 25 potential impact on your neighbors were not</p>
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<p>1 Q. No, why wouldn't -- assuming IDEM regulations do 2 not regulate odors and air emissions and odors 3 from CAFOs, you said that that would not -- had 4 you known that, that would not have made an impact 5 in your decision-making about where to locate the 6 4/9 CAFO, correct? 7 A. Correct, because we had these experts that pretty 8 well confirmed that it was a good place to build, 9 so that -- 10 Q. Okay, I think that may answer my question. Then 11 my follow-up was: Well, why would that have not 12 impacted your decision about where to locate the 13 CAFO? 14 A. Because of our experts saying that it was a 15 good -- a good spot to build. 16 Q. Okay. So even if you knew that the regulations 17 that they were helping you comply with did not 18 address odors and air emissions from CAFOs, that 19 would not have changed your decision-making in 20 where to locate the CAFO? 21 A. Correct. 22 MR. BRAUN: It's a double negative. Go 23 ahead and answer, that's fine. 24 A. Restate that one more time. Sorry. 25 QUESTIONS CONTINUING BY MS. FERRARO:</p>	<p>1 anything that you considered or were concerned 2 about? 3 A. I was not concerned because our experts said there 4 was no need in it, I guess. 5 Q. I believe you already have Exhibit 8 in front of 6 you. 7 MR. BRAUN: Did you say 8? 8 MS. FERRARO: Yes, uh-huh. 9 A. (Witness retrieves document). 10 QUESTIONS CONTINUING BY MS. FERRARO: 11 Q. Do you have it in front of you? 12 A. Yes. 13 Q. Have you seen this document? 14 A. Yes. 15 Q. Could you identify this document for the record? 16 THE WITNESS: Excuse me. 17 A. Manure Land Use Agreement. 18 QUESTIONS CONTINUING BY MS. FERRARO: 19 Q. Thank you. It looks like there are actually three 20 of them here, and the first question I want to ask 21 is: Where did you find the form for this, for 22 these Manure Land Use Agreements? I'm -- I'm 23 sorry, actually scratch that question. Let me 24 confirm. 25 If you look down at the bottom, you see</p>

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<p>1 that each of the Agreements are dated December 17, 2 2012. Do you see that. 3 A. Yes. 4 Q. And the first one is signed by you, Clint Himself, 5 as a Landowner; the Producer, Cory M. Himself, on 6 behalf of 4/9 Livestock, LLC. Do you see that? 7 A. Yes. 8 Q. Okay. And the second one is signed -- boy, you 9 may have to help me out there -- Producer also 10 Cory M. Himself, Landowner also Cory M. Himself; is 11 that correct? 12 A. That's what it looks like, yes. 13 Q. I'm not sure of the signature. And then the third 14 one is signed for the Producer, Cory M. Himself, on 15 behalf of 4/9 Livestock and the Landowner Samuel 16 T. Himself; is that correct? 17 A. Yep. 18 Q. 4/9 Livestock had not been created yet, correct, 19 as of the date that these Manure Land Use 20 Agreements were entered into? 21 A. I believe that would be correct. 22 Q. Is it fair to say that the determination about 23 where manure application for the 4/9 CAFO would be 24 had been determined sometime before 4/9 Livestock 25 was created?</p>	<p>1 A. Is that what you're saying? 2 Q. Yes, yes. 3 A. I'd -- I would say yes. 4 Q. And certainly the decision to create 4/9 Livestock 5 had been made sometime prior to this December 17, 6 2012, correct? 7 A. Yes. 8 Q. My final question is: Where did you find these 9 forms for use in -- in entering into these Manure 10 Land Use Agreements? 11 A. I do not know. 12 Q. Could one of your consultants have provided the 13 form -- forms to you? 14 A. I really don't know. 15 Q. Down at the bottom you see that it shows this was 16 received by the Department of Environmental 17 Management, Office of Land Quality. Does that 18 help in any way refresh your recollection or help 19 inform your answer to that question? 20 A. Of where the documents came from? 21 Q. Yes. 22 A. I still don't -- I'm -- if I had to guess, I'd say 23 it came from there, but I really don't know. 24 Q. Okay. If you don't know, you don't know. 25 A. Okay.</p>
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<p>1 A. Can you ask that one more time? 2 Q. Yes. I'm assuming these are Manure Land Use 3 Agreements for purposes of applying manure on land 4 produced by the 4/9 CAFO; is that correct? 5 A. Yes. 6 Q. So these Land Use Agreements were entered into for 7 purposes -- 8 MS. FERRARO: I'm having a tough morning 9 as well. 10 QUESTIONS CONTINUING BY MS. FERRARO: 11 Q. Fair to say that the land where manure would be 12 applied from the 4/9 CAFO had been determined 13 sometime prior to December 17, 2012, correct? 14 A. Correct. 15 Q. And you stated earlier that the two factors that 16 your brother and your father and you considered in 17 deciding where to locate the CAFO relied at least 18 on one of those factors about where there would be 19 available land to apply the manure, correct? 20 A. Yes. 21 Q. Is it fair to say then that the preferred location 22 had also been selected at some time before 23 December 17, 2012? 24 A. The preferred? 25 Q. Yes.</p>	<p>1 Q. That's fair. We -- I believe you have Exhibit 10 2 in front of you. 3 A. (Witness retrieves document). 4 Q. Ready? 5 A. Yep. 6 Q. Looking at the signature pages -- or signature 7 page, which I believe is Page 27, you see that? 8 A. Yes. 9 Q. Actually can you identify this document for the 10 record? 11 A. Operating Agreement, 4/9 Livestock, LLC. 12 Q. And then looking at the signature page, I see that 13 there -- it's not signed. 14 A. Correct. 15 Q. You see that? 16 A. Yes. 17 Q. So you produced -- 4/9 produced an unsigned copy; 18 I assume there is a signed copy of this Agreement 19 somewhere? 20 A. Yes. 21 Q. To your knowledge -- and feel free to take a look 22 at the Agreement -- would the -- is this unsigned 23 copy the same as the signed copy? 24 A. I would assume so, yes. 25 Q. And on the signature page it says right above the</p>

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<p>1 A. It's -- where it was zoned right then? Or I don't 2 understand your question, I guess. 3 Q. The Zoning Ordinance that the application had to 4 comply with, had you read the Zoning Ordinance, 5 too? 6 A. I don't recall if I did or not. 7 Q. You should have Exhibit 34 in front of you. 8 MR. BRAUN: It looks like this, 9 (indicating). 10 THE WITNESS: Huh? 11 MR. BRAUN: It looks like this, 12 (indicating). 13 THE WITNESS: They're out of order. 14 MR. BRAUN: Let's see if it's in here. 15 THE WITNESS: Here it is, (indicating). 16 MR. BRAUN: Okay. 17 THE WITNESS: Sorry. 18 MS. FERRARO: Set? 19 THE WITNESS: I think so. 20 QUESTIONS CONTINUING BY MS. FERRARO: 21 Q. Okay. So this is the cover of the Zoning 22 Ordinance. Does this look familiar? Is this 23 something that refreshes your recollection as to 24 whether or not you've reviewed it? It's a few 25 pages of the very specific section that we're</p>	<p>1 Q. It doesn't say there that it's to promote 2 intensive livestock agriculture, does it? 3 A. I don't see it there, no. 4 Q. So someone looking at this Ordinance would 5 reasonably understand that the purpose of the 6 zoning districts established were in place to 7 protect public health, safety, comfort, and 8 general welfare and property values, correct? 9 MR. BRAUN: I'll object to the extent 10 it's an incomplete statement. There are actually 11 four purposes listed, of which you read correctly 12 two of them. 13 Subject to that, you may answer the 14 question. 15 THE WITNESS: Can you ask it again, 16 please? 17 QUESTIONS CONTINUING BY MS. FERRARO: 18 Q. Sure. Someone looking at this Ordinance would 19 reasonably read this and understand that it was 20 enacted to promote in part the public health, 21 safety, comfort and general welfare and conserve 22 and protect property and property values, correct? 23 A. That's what it says. 24 MR. BRAUN: Same objection. Subject to 25 that, you may answer the question.</p>
Page 75	Page 77
<p>1 dealing with, the AGI and AGR zoning districts. 2 It's not the whole -- 3 MS. FERRARO: We wanted to save trees, 4 didn't print the whole thing off. 5 A. Okay. 6 QUESTIONS CONTINUING BY MS. FERRARO: 7 Q. Is this -- did you review these provisions, this 8 document? 9 A. I believe I have seen it, yes. 10 Q. When would you have first reviewed this document? 11 A. I don't recall exactly when it was. 12 Q. Was it before the rezoning or after? 13 A. Before. 14 Q. Would have been before. So you would have looked 15 at this to familiarize yourself with what your dad 16 and your brother were requesting? 17 A. I would say yes. 18 Q. If you could turn to the first page following the 19 cover under Section 1.2, you see under Purpose it 20 says: This Ordinance is enacted by Hendricks 21 County for the purpose of promoting public health, 22 safety, comfort and general welfare. And then 23 Bullet Number 2, to conserve and protect property 24 and property values. Do you see that? 25 A. Yep.</p>	<p>1 A. That's what it says, yes. 2 QUESTIONS CONTINUING BY MS. FERRARO: 3 Q. Certainly that's what the County intended by 4 enacting the 2008 Zoning Ordinance; that's what it 5 expressly states in the Purpose of the Ordinance 6 itself, correct? 7 MR. BRAUN: Same objection. Subject 8 to -- you've correctly read two of the four 9 purposes set forth on Page 1-1 of the Ordinance. 10 Subject to that, you may answer the 11 question. 12 A. Yes, that's what that line one and two say. 13 QUESTIONS CONTINUING BY MS. FERRARO: 14 Q. If you could turn to Page 1-3. 15 A. (Witness complies). 16 Q. In line with -- under Interpretations, 1.7, in 17 line with the purpose of the Zoning Ordinance, it 18 states that the interpretation and application -- 19 "In their interpretation and application, the 20 provisions of this Ordinance shall be held to be 21 minimum or maximum requirements, adopted for the 22 promotion of the public health, safety, and 23 general welfare". Do you see that? 24 A. Yes. 25 Q. In another place it's stating the purpose of this</p>

Page 78	Page 80
<p>1 Ordinance is to protect public health, safety, and</p> <p>2 welfare, not to promote intensive livestock</p> <p>3 agriculture, correct?</p> <p>4 A. I don't see anything about Intensive Agriculture.</p> <p>5 Would you -- can you restate that again?</p> <p>6 Q. I think you answered my question. But my question</p> <p>7 is: Here again it states that the Ordinance is to</p> <p>8 be interpreted to protect public health, safety,</p> <p>9 and general welfare, it is not to be interpreted</p> <p>10 to promote intensive livestock agriculture in</p> <p>11 Hendricks County, correct?</p> <p>12 A. I suppose, yes.</p> <p>13 Q. And in fact underneath that, the definition of the</p> <p>14 word "shall" is a mandatory requirement, and the</p> <p>15 word "shall" is actually used in that</p> <p>16 interpretation provision. Do you see that?</p> <p>17 A. Where are you at?</p> <p>18 Q. If you go down to 1.8, it says the word "shall" is</p> <p>19 a mandatory requirement and the word "may" is a</p> <p>20 permissive requirement, and the word "should" is a</p> <p>21 preferred requirement.</p> <p>22 So in Section 1.7 when it says that the</p> <p>23 Ordinance "shall" be held to minimum or maximum</p> <p>24 requirements and adopted for the promotion of</p> <p>25 public health, safety, and general welfare, that's</p>	<p>1 Q. And the surrounding properties in the area were</p> <p>2 all AGR as well?</p> <p>3 A. Yes.</p> <p>4 Q. They did not -- they were not zoned for Intensive</p> <p>5 Agricultural uses, correct?</p> <p>6 A. Correct.</p> <p>7 Q. And if you can go to the next page, 4-2 under 4.2,</p> <p>8 Zoning Districts Transition, there's a table</p> <p>9 there, Table 4.1, titled Agricultural and</p> <p>10 Residential Transitional Districts. Do you see</p> <p>11 that?</p> <p>12 A. Yep.</p> <p>13 Q. And it shows that there were "Previously</p> <p>14 Established Zoning Districts" and then there are</p> <p>15 "Newly Established Zoning Districts" that were</p> <p>16 created under the 2008 Zoning Ordinance. Do you</p> <p>17 see that?</p> <p>18 A. Yes.</p> <p>19 Q. If you would look at the column for Newly</p> <p>20 Established Zoning Districts, you see AGI, the</p> <p>21 Agriculture, Intense District; that actually did</p> <p>22 not exist before the 2008 Zoning Ordinance. Do</p> <p>23 you see that?</p> <p>24 A. Yep.</p> <p>25 Q. But the AGR District prior to its designation as</p>
Page 79	Page 81
<p>1 mandatory, correct?</p> <p>2 A. I think that's what it says, yes.</p> <p>3 Q. If you can turn to Page 4-1.</p> <p>4 A. (Witness complies).</p> <p>5 Q. At the top of the page you note that there are</p> <p>6 three different Agricultural Districts. Do you</p> <p>7 see that?</p> <p>8 A. On part 1? Yes.</p> <p>9 Q. Yeah, under 4.</p> <p>10 A. 4.1.</p> <p>11 Q. 4.1, yes. And the three districts are AGB,</p> <p>12 Agricultural Business District; AGI, Agricultural</p> <p>13 Intensive District; and AGR, Agricultural</p> <p>14 Residential District. Do you see that?</p> <p>15 A. Yeah.</p> <p>16 Q. So the County is distinguishing between the</p> <p>17 different types of agriculture, that that's more</p> <p>18 business-oriented, intense -- intensive uses such</p> <p>19 as CAFOs, and then more rural residential type</p> <p>20 uses. Would that be your understanding as well?</p> <p>21 A. Yes.</p> <p>22 Q. And your father's property before it was rezoned</p> <p>23 was -- excuse me -- the AGR, Agricultural</p> <p>24 Residential, correct?</p> <p>25 A. Correct.</p>	<p>1 AGR was R-A, for Rural Residential District. Do</p> <p>2 you see that?</p> <p>3 A. Yes.</p> <p>4 Q. So even prior to 2008, your father's property and</p> <p>5 all the surrounding properties had been zoned for</p> <p>6 Rural Residential land use, correct?</p> <p>7 A. I think that -- yes.</p> <p>8 Q. So I'll go back to my question, that given the</p> <p>9 longstanding -- add a factor. Given the</p> <p>10 longstanding zoning of your father's property and</p> <p>11 all the surrounding land uses that historically --</p> <p>12 historically had been zoned for Rural Residential</p> <p>13 land use, not Intensive Agriculture, would a</p> <p>14 person reasonably reading this Ordinance prior to</p> <p>15 the time the property was rezoned feel that their</p> <p>16 property would be protected from the encroachment</p> <p>17 of Intensive Agricultural use?</p> <p>18 MR. BRAUN: And I'll object. The</p> <p>19 question calls for speculation. Secondly, the</p> <p>20 Exhibit Number 34 is an incomplete portion of the</p> <p>21 2008 Zoning Ordinance and its additional language</p> <p>22 which has been not included here.</p> <p>23 Subject to that, you may answer the</p> <p>24 question.</p> <p>25 A. I really don't know.</p>

Page 94	Page 96
<p>1 roughly six miles away from the immediate</p> <p>2 vicinity. Do you see that?</p> <p>3 A. Yes.</p> <p>4 Q. His property wouldn't be impacted by the rezoning</p> <p>5 or CAFO, correct?</p> <p>6 A. (Witness shrugs).</p> <p>7 Q. Six miles away?</p> <p>8 A. I reckon; probably not.</p> <p>9 Q. If you turn to I guess it's -- I'm trying to read</p> <p>10 the page numbers -- Page 10, Matt Schmitt, he</p> <p>11 testified -- or testified, I'm sorry. He made a</p> <p>12 comment that his current residence at the time was</p> <p>13 in Avon, Indiana, which is nowhere real close to</p> <p>14 the immediate vicinity of the CAFO property,</p> <p>15 correct?</p> <p>16 A. But the ground he purchased was.</p> <p>17 Q. Right, but at the time he wasn't -- he was not</p> <p>18 living there at the time, correct?</p> <p>19 A. Oh, correct.</p> <p>20 Q. And he also states sort of midway in that he works</p> <p>21 in the Agri-Business sector. Do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. If you turn to Page 13 --</p> <p>24 A. (Witness complies).</p> <p>25 Q. Are you there?</p>	<p>1 A. Yeah, he lived six miles away.</p> <p>2 Q. And he also is in the Agri-Business sector working</p> <p>3 for Co-Alliance, correct?</p> <p>4 A. Yes.</p> <p>5 Q. If you turn to Page 18 --</p> <p>6 A. (Witness complies).</p> <p>7 Q. -- there is some comments made by Jeff Fleece who</p> <p>8 states that he lives at 4775 North County</p> <p>9 Road 625 West in North Salem. Do you see that?</p> <p>10 A. Yep.</p> <p>11 Q. And he's in support of what was being proposed,</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. That property -- I also Googled it -- is about</p> <p>15 four miles away. Any reason to disagree with</p> <p>16 that?</p> <p>17 A. No.</p> <p>18 Q. Mr. Fleece wouldn't be immediately impacted,</p> <p>19 doesn't live in the immediate vicinity of the</p> <p>20 proposed property to be rezoned, correct?</p> <p>21 A. The immediate as far as one-mile radius or --</p> <p>22 Q. Well it's four miles away, so it's not in the</p> <p>23 immediate area.</p> <p>24 A. Okay.</p> <p>25 Q. Correct?</p>
Page 95	Page 97
<p>1 A. Uh-huh.</p> <p>2 Q. Okay.</p> <p>3 A. Sorry.</p> <p>4 Q. -- down to where Kevin Still made comments, he --</p> <p>5 he states that he's with Co-Alliance who is -- who</p> <p>6 4/9 eventually entered into the Hog Production</p> <p>7 Contracts with, correct?</p> <p>8 A. With Co-Alliance?</p> <p>9 Q. Yes.</p> <p>10 A. Yes.</p> <p>11 Q. And he states that he lives at 1941 Knights Bridge</p> <p>12 Road in Danville, which he states is about two</p> <p>13 miles east of the site. That's -- that's not</p> <p>14 accurate, is it?</p> <p>15 A. I'm not really for sure how far away it is.</p> <p>16 Q. Well, I so happened to Google it and I can tell</p> <p>17 you that at least by Google Maps, it's about</p> <p>18 six-and-a-half miles away. Do you have any reason</p> <p>19 to not agree with that?</p> <p>20 A. (Witness shrugs). If you Googled it, I'll take</p> <p>21 your word for it.</p> <p>22 Q. Needless to say Co-Alliance -- or I'm sorry --</p> <p>23 Mr. Kevin Still, whether it's two miles away or</p> <p>24 six-and-a-half miles away, didn't live in the</p> <p>25 immediate vicinity, correct?</p>	<p>1 A. Yes.</p> <p>2 Q. I believe I flagged for you all of the people that</p> <p>3 spoke in favor of the Zoning Ordinance -- or the</p> <p>4 rezoning of your dad's property. Did I miss</p> <p>5 anyone?</p> <p>6 A. (Witness reviews document). I don't think so.</p> <p>7 Q. So again going back to my prior question, everyone</p> <p>8 that spoke in favor of the rezoning of your dad's</p> <p>9 property were either -- or both in the</p> <p>10 Agri-Business sector or owned property that would</p> <p>11 not be affected by the proposed rezone?</p> <p>12 A. I'd say that's -- sure, yes.</p> <p>13 Q. Is it fair to say that you disregarded your</p> <p>14 neighbors' concerns that were raised at that</p> <p>15 hearing?</p> <p>16 A. No, I don't -- I don't agree with that, no, I</p> <p>17 don't.</p> <p>18 Q. Why do you disagree with that?</p> <p>19 A. Because we took our plan to the -- the Plan</p> <p>20 Committee and they approved it, so they obviously</p> <p>21 thought that it was the right setting for that</p> <p>22 application, so that's the way I feel I guess.</p> <p>23 Q. I appreciate that, but my question was: The</p> <p>24 concerns raised by your neighbors --</p> <p>25 MS. FERRARO: Strike that.</p>

<p style="text-align: right;">Page 98</p> <p>1 QUESTIONS CONTINUING BY MS. FERRARO: 2 Q. My question is: Aside from the fact that the Plan 3 Commission approved it, you disregarded the 4 concerns raised by your neighbors at this rezoning 5 hearing, correct? 6 A. No, I -- ask it one more time. Sorry. 7 Q. Understanding that the Plan Commission approved 8 the rezoning application, there were specific 9 concerns, we went through them earlier, that your 10 neighbors raised. My question to you is you -- 11 you disregarded their -- those concerns raised at 12 that public hearing against the proposal? 13 MR. BRAUN: I'll object only to the 14 extent the question has been asked and answered. 15 Subject to that, you may answer the 16 question. 17 THE WITNESS: I don't know how to answer. 18 A. Well, yeah, I guess we did, yes. 19 QUESTIONS CONTINUING BY MS. FERRARO: 20 Q. You believed that your right to build a CAFO 21 trumped their property rights? 22 A. We just relied on the Plan Commission allowing us 23 to change the zoning. 24 Q. As long as you met the zoning, their concerns 25 didn't matter?</p>	<p style="text-align: right;">Page 100</p> <p>1 Q. Okay. This is not your handwriting? 2 A. No, it's not. 3 Q. It's not your dad's or your brother's handwriting? 4 A. It could be. I don't recall seeing these pages 5 though, no. 6 Q. If you turn to the second page, there appears to 7 be two sets of handwriting. Do you recognize 8 either -- any of the handwriting here? 9 A. Not mine, I can tell you that. 10 Q. Okay. Looking at the last page, looks like it's 11 the Hendricks County Board of Commissioners agenda 12 for the March 26, 2013 hearing. Have you seen 13 this document? It has handwriting on it. Have 14 you seen this before? 15 MR. BRAUN: Kim, are you referring to it 16 as a clean document or as a handwritten document? 17 MS. FERRARO: Handwritten, yes. My 18 apologies. 19 MR. BRAUN: Her question is as it's 20 presented to you. 21 A. I don't recall seeing it. 22 QUESTIONS CONTINUING BY MS. FERRARO: 23 Q. And do you recognize the handwriting on this 24 document? 25 A. That's not mine, I can tell you that. Other than</p>
<p style="text-align: right;">Page 99</p> <p>1 A. (Witness shrugs). 2 Q. Did you answer? 3 A. Was that a question? 4 Q. Yes. 5 A. Please ask it again, I'm sorry. 6 MS. FERRARO: Can you read back the 7 question? 8 (A portion of the record was 9 read back by the Court Reporter.) 10 A. Correct. 11 (Deposition Exhibit 38 was marked 12 for identification by Ms. Ferraro 13 and a copy was provided to Counsel.) 14 MS. FERRARO: This is Exhibit 38. 15 QUESTIONS CONTINUING BY MS. FERRARO: 16 Q. I'm showing you Exhibit 38. This appears to be 17 some handwritten notes. Have you -- have you seen 18 this? 19 MS. FERRARO: Scratch that. 20 QUESTIONS CONTINUING BY MS. FERRARO: 21 Q. This is a document produced by 4/9, and it appears 22 to be handwritten notes. Have you seen this 23 document before? 24 A. I can't hardly even read it. I don't recognize -- 25 I don't recall seeing it.</p>	<p style="text-align: right;">Page 101</p> <p>1 that, no. 2 Q. And you don't recognize who -- who it might be, 3 whose handwriting it might be? 4 A. I'm not for sure, no. 5 Q. Okay. 6 (Deposition Exhibit 39 was marked 7 for identification by Ms. Ferraro 8 and copies were provided to Counsel.) 9 QUESTIONS CONTINUING BY MS. FERRARO: 10 Q. Exhibit 39 is also one -- one page of handwritten 11 notes. Do you recognize this document? 12 A. No, I do not. 13 Q. You don't. Do you recognize the handwriting on 14 the document? 15 A. No, I -- I do not. 16 Q. After the property where the CAFO is built -- 17 MS. FERRARO: Strike that. 18 QUESTIONS CONTINUING BY MS. FERRARO: 19 Q. After the property that your dad owned where the 20 CAFO was built was rezoned from AGR to AGI, which 21 would have been sometime after that March 12th, 22 2013 hearing, what -- what happened next? 23 A. With the property? 24 Q. Uh-huh. 25 A. 4/9 Livestock was changed over to the</p>

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1 correct? If you look on the last page of each of
 2 these brochures --
 3 A. (Witness complies).
 4 Q. -- you'll see that they're published by the
 5 National Pork Board?
 6 A. Yep.
 7 Q. And they were -- also looking at the last page,
 8 bottom corner of each of these, published in May
 9 of 2007. To the lower right, do you see that?
 10 A. Yep.
 11 Q. In each of these brochures: Exhibit 23, is on
 12 Siting and Building Design, Considerations to
 13 Reduce Odor Potential from Swine Facilities.
 14 Exhibit 56 is Swine Manure Storage and
 15 Handling Practices to Minimize Odors.
 16 Exhibit 55 is Swine Manure Land
 17 Application Practices to Minimize Odors, and Basic
 18 Management Practices to Mitigate and Control Odors
 19 from Swine Operations.
 20 So at least until at least as of May
 21 2007, there were publications available to you as
 22 a pork producer on how to address odors from --
 23 from CAFOs, correct?
 24 A. Yes, these were out.
 25 Q. From the National Pork Board? You had access to

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1 this information, if you wanted to use it?
 2 A. If I wanted to, yes.
 3 Q. Have you ever looked at these publications after
 4 you heard of your neighbors' concerns about odors
 5 from the CAFO that you were proposing to build?
 6 A. I have not.
 7 Q. Have you heard of the National Hog Farmer
 8 magazine?
 9 A. Ah, that sounds familiar. I believe I have, yes.
 10 Q. If on its Website it says it's the business
 11 magazine from the pork industry for over 50 years,
 12 would you have any reason to disagree with that
 13 statement?
 14 A. I guess that's their claim, so --
 15 Q. Do you consider -- you've heard of it. Do you
 16 consider it a leading business magazine of the
 17 pork industry?
 18 A. I -- I really can't say that I do because I -- I
 19 don't -- I don't receive it, I guess.
 20 Q. You know of other people who have received it,
 21 other pork producers who -- who read it?
 22 A. Not particularly, no.
 23 Q. Who -- how are you aware of the --
 24 A. I've heard of it. I've never -- I mean I don't --
 25 I don't receive it and I don't know of anybody

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1 that -- but I have heard of it. I don't know, I
 2 don't recall where I -- (witness shrugs).
 3 Q. Okay. Given the title of the publication,
 4 National Hog Farmer, presumably its intended
 5 reading audience would be hog farmers such as
 6 yourself, correct?
 7 A. Correct.
 8 Q. And there are many publications, I think you
 9 listed one in your Answers to Interrogatories that
 10 you've read off and on over the years. I'm now
 11 forgetting what it was, but --
 12 A. Successful Farming, I think.
 13 Q. Thank you, yes. But there are publications like
 14 that out there, correct? Like the National Hog
 15 Farmer and the one that you subscribed to off and
 16 on over the years --
 17 A. Yes.
 18 Q. -- that are available to you to learn of issues of
 19 interest to your industry as a pork producer,
 20 correct?
 21 A. Correct.
 22 Q. You should have Exhibit 21 in front of you.
 23 A. (Witness retrieves document).
 24 Q. And you also should have Exhibit 26 in front of
 25 you.

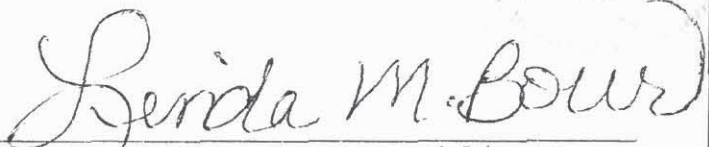
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1 A. (Witness retrieves document).
 2 Q. And you should have Exhibit 25 also in front of
 3 you.
 4 A. (Witness retrieves document).
 5 Q. Did you find those exhibits?
 6 A. 25, 26, 21?
 7 Q. Yes.
 8 A. Yes.
 9 Q. Looking at Exhibit 21, it's an article downloaded
 10 from the National Hog Farmer website. It's an
 11 article dated December 1, 1997 entitled Free
 12 On-Farm Odor Assessments. Do you see that?
 13 A. Yes.
 14 Q. And it starts second paragraph down "A new program
 15 being developed through the National Pork
 16 Producers Council will require the services of
 17 many more environmental engineers who currently
 18 work in the livestock industry. The work of
 19 engineers will go a long way in helping pork
 20 producers solve odor problems that threaten the
 21 viability of the industry." Do you see that?
 22 A. Yes.
 23 Q. And this program is known as the On-Farm Odor
 24 Management Assistance Program.
 25 Engineers will conduct on-farm odor

25

1 disinterested person in this cause of action; that
2 I am not a relative or attorney of any of the
3 parties, or otherwise interested in the event of
4 this action, and am not in the employ of the
5 attorneys for any of the parties.

6 IN WITNESS WHEREOF, I have hereunto set my
7 hand and affixed my notarial seal this 27th day of
8 September 2016

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10
11
12 
13 Linda M. Bour, Notary Public,
14 Residing in Marion County, Indiana
15 My Commission Expires: June 19, 2024
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**CERTIFICATE OF NOTARY AS TO
FAILURE OF WITNESS TO SIGN TRANSCRIPT
WITHIN TIME ALLOWED BY TRIAL RULES**

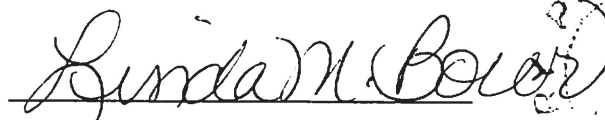
I hereby certify that LINDA M. BOUR, a Notary Public in and for the County of MARION, State of Indiana, administered an oath at the deposition of CLINTON M. HIMSEL on the 7TH day of SEPTEMBER, 2016;

That said deposition transcript was made available to the witness for reviewing and signing under the applicable rules of procedure;

That the original transcript was either/or

- ☐ RETURNED UNSIGNED
☐ RETAINED BY THE WITNESS
☒ WITNESS FAILED TO SIGN WITHIN TIME PERIOD ALLOWED UNDER RULES.
☐ OTHER EXPLANATION GIVEN _____

We are therefore filing this original unsigned transcript on this 20TH day of JANUARY, 20 17.


LINDA M. BOUR, NOTARY PUBLIC

County of Residence: MARION
Commission Expires: JUNE 19, 2024



CONFINED FEEDING OPERATION COMPLETED CONSTRUCTION AFFIDAVIT

State Form 51255 (R / 6-12)

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Confined Feeding Section
Office of Land Quality
100 North Senate Avenue
MC 65-45, IGCN 1101
Indianapolis, Indiana 46204
(800) 451-6027 extension 2-4473

INSTRUCTIONS: Complete, sign, date, notarize and return this form to the address above within thirty (30) days of completed construction AND prior to the introduction of animals.

NOTE: This form may be used multiple times during a phased construction project. Should you desire to populate a completed barn prior to completion of the remaining construction, this form must be submitted.

Cory M. Himsel, being first duly sworn upon oath, deposes and says:
(Owner / Operator Name)

- I live in Hendricks County, Indiana, and being of sound mind and over twenty-one (21) years of age, I am competent to give this affidavit.
- I am legally authorized to make the representations in this Affidavit on behalf of 4/9 Livestock, LLC, the recipient of approval number AW- 6297 issued on 5-31-13.
- I know and understand the requirements for construction of the confined feeding operation as imposed by the approval.
- I have personal knowledge of the construction of the confined feeding operation that is the subject of the approval.
- As required by Indiana Code 13-18-10-1.4, I HEREBY AFFIRM UNDER PENALTY OF PERJURY THAT THE CONFINED FEEDING OPERATION (or a portion of the facility) WAS CONSTRUCTED IN ACCORDANCE WITH THE APPROVAL LETTER FROM THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, IC 13-18-10, AND 327 IAC 19.
- (Initial here if this section applies.) I have submitted written notification to IDEM of any changes to the facility, allowed by 327 IAC 19-8-3(b), after the approval letter was effective.
- As required by Indiana Code 13-18-10-1.4, I HEREBY AFFIRM UNDER PENALTY OF PERJURY THAT THE CONFINED FEEDING OPERATION WILL BE OPERATED IN ACCORDANCE WITH THE APPROVAL LETTER FROM THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, IC 13-18-10, AND 327 IAC 19.

I affirm under penalty of perjury that the representations contained in this affidavit are true, complete and accurate to the best of my knowledge and belief.

Cory M. Himsel
Signature of Affiant

Cory M. Himsel
Printed Name of Affiant

9/19/13
Date (month, day, year)

STATE OF INDIANA COUNTY OF Morgan

Before me as a Notary Public in and for said County and State, Morgan personally appeared and being duly sworn by me upon oath, says that the facts stated in the foregoing instrument are true. Signed and sealed this 20 day of September, 2013.

Signature: Sandra Eaton

Printed Name: SANDRA EATON

My Commission Expires (month, day, year): 2-4-17

Resident of Morgan County

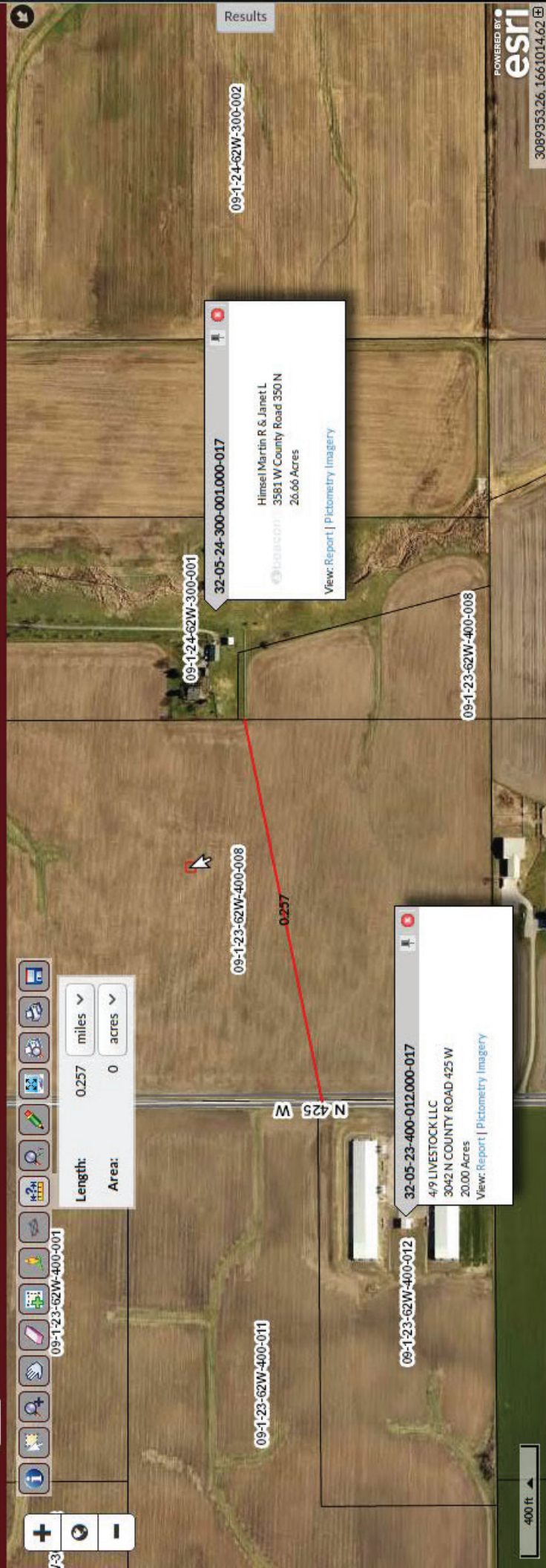
RECEIVED

SEP 23 2013

DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT
OFFICE OF LAND QUALITY



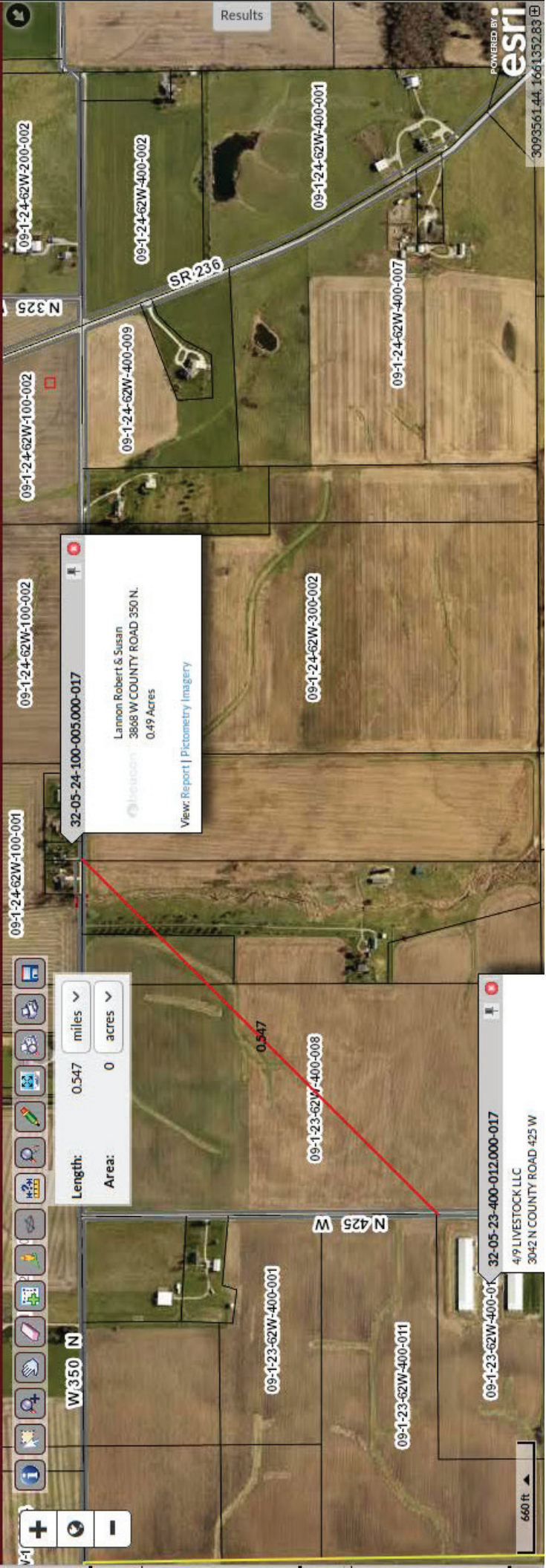
Length: 0.257 miles
Area: 0 acres





Length: 0.547 miles
Area: 0 acres

32-05-24-100-003.000-017
Lannon Robert & Susan
3868 W COUNTY ROAD 350 N.
0.49 Acres
View Report | Pictometry Imagery



32-05-23-400-012.000-017
4/9 LIVESTOCK LLC
3042 N COUNTY ROAD 425 W

STATE OF INDIANA	)	IN THE HENDRICKS SUPERIOR COURT
	) SS:	
HENDRICKS COUNTY	)	CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON, and)
SUSAN M. LANNON,)
)
Plaintiffs,)
)
v.)
)
SAMUEL T. HIMSEL, CORY M.)
HIMSEL, CLINTON S. HIMSEL,)
4/9 LIVESTOCK, LLC, and)
CO-ALLIANCE, LLP,)
)
Defendants.)

AFFIDAVIT OF SAMUEL HENDERSON

I, Samuel Henderson, hereby affirm under penalty of perjury that:

1. I am one of Plaintiffs' counsel in this case.
2. On December 14, 2016, using the map view of the Hendricks County Beacon GIS at <https://beacon.schneidercorp.com/Application.aspx?AppID=327>, I located the relevant properties of 4/9 Livestock, LLC, Richard and Janet Himself, and Robert and Susan Lannon, shown in the attached screenshots.
3. I used the in-browser "identify" and "measure" tools to label the properties and measure the distance in miles from the 4/9 Livestock property line to the property lines of the Himsels and Lannons. I then took the screenshots to which this affidavit is attached.
4. The screenshots accurately represent the website content as it appeared in my browser at that time.
5. The website is labeled as the Hendricks County GIS, and is linked from the Hendricks County government website.

I verify under penalty of perjury that the above facts are true to the best of my knowledge and belief.

Date: Jan. 20, 2017



Samuel Henderson

COMER LAW OFFICE, LLC

Attorneys-at-Law

71 WEST MARION STREET

P.O. BOX 207

DANVILLE, IN 46122

LEE T. COMER
AMY COMER ELLIOTT
BEN COMER
ANDREW P. KULT

PHONE: (317) 745-4300
FAX: (317) 745-3029

March 1, 2013

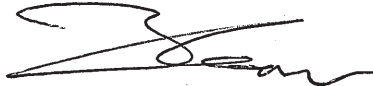
Dear Landowner:

Please be advised that Samuel T. Himsel has petitioned the Hendricks County Plan Commission for approval of a Zoning Amendment from the current AGR: Agriculture, Residential Zoning District to the AGI: Agriculture, Intense Zoning District. Said property is located in Marion Township, Hendricks County, Indiana. Said real estate is more commonly known as being located approximately 1300 feet south of CR 350 N on the west side of CR 425 W, Danville, Indiana.

Enclosed please find a copy of the "Letter of Intent" as provided to the Hendricks County Plan Commission. A public hearing shall be held by the Commission at 6:30 p.m. on March 12, 2013, at the Hendricks County Government Center, 355 South Washington Street, Danville, Indiana, in Meeting Rooms #4 and #5, at which time this application shall be considered.

The petition may be examined in the Office of the Planning and Building Department, located at the Hendricks County Government Center, 355 South Washington Street, Danville, Indiana, 46122, between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday. Written comments to a proposal may be filed at the above address with the Secretary of the Plan Commission and such comments will be considered.

Very truly yours,



Ben Comer,
Attorney for Petitioner

BC/amb

enclosure

LETTER OF INTENT

Sam Himsel wishes to rezone a 58-acre tract along County Road 425 West in Marion Township, from AGR zoning to AGI zoning. The purpose of the rezone is to allow the Himsel family to build and operate a new confined feeding facility for hogs, separate from the existing facilities.

The Himsel family has been farming in Hendricks County since 1948, and have raised pigs consistently during the last sixty (60) years. Petitioner currently has four (4) hog barns, located on three (3) different sites in Center Township, Hendricks County. The existing facilities have been in operation for many years, and were started under prior County Zoning Ordinances that allowed feeding operations within the base agricultural zoning district. In order for the Himsels to build a new facility, a zoning change is required, as the 2008 County Zoning Ordinance specifically requires confined feeding operations to be within the AGI zoning district.

The Himsel family will be feeding pigs owned by Midland Co-Alliance, LLP of Danville, Indiana. Petitioner intends to construct two (2) "dual quad" feeding barns, each containing approximately 33,500 square feet. Each barn will house up to 4,000 pigs each, for a total of 8,000 head. Small pigs will be brought in to the farm twice per year, and fattened pigs will be shipped out to market twice per year. Waste will be collected in concrete storage pits, and removed from the site using the dragline ("hose") method, where it will be injected into nearby tillable fields owned or farmed by the Himsel family. Corey Himsel and family live in the house closest to the new site, and he is actively involved in the operations.

Petitioner will be required to obtain proper IDEM permits for the business. Petitioner commits to obtaining the required IDEM permits within one (1) year of rezoning. All State regulations will be met for waste management, building set backs, and business operations. No federal permit is required. All County development standards will be met, and confirmed through a Development Plan Review process.

The County Comprehensive Plan has a chapter designated to protecting the Agriculture uses in Hendricks County. Over half the county is still farm country, and it is important to retain and support that culture as part of our identity. The Comprehensive Plan states, "Hendricks County recognizes agriculture as a viable industry and supports its continuation into the future as the County experiences growth and development." The goals and objectives stated in this chapter led to the creation of the AGI zoning district, where confined feeding operations are to be located. Given the location of the subject tract in rural Marion Township, in the heart of farm country, we believe this is exactly where such a use should be located.

For these reasons, we respectfully request the rezone application be approved.

Respectfully submitted,



Ben Comer
Attorney for Petitioner

STATE OF INDIANA	)	IN THE HENDRICKS SUPERIOR COURT
	) SS:	
HENDRICKS COUNTY	)	CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and)
SUSAN M. LANNON,)

Plaintiffs,)

v.)

SAMUEL T. HIMSEL, CORY M.)
HIMSEL, CLINTON S. HIMSEL,)
4/9 LIVESTOCK, LLC, and)
CO-ALLIANCE, LLP,)

Defendants.)

AFFIDAVIT OF BEN COMER

I, Ben Comer, hereby state:

1. I am over the age of eighteen and have personal knowledge of the representations set forth herein and would testify consistent with this affidavit if called to testify.

2. I am a practicing attorney at the law firm of Comer Law Office LLC in Danville, Indiana. I also serve as President of The Abstract & Title Companies, which maintains seven office locations in west/central Indiana.

3. In 2013, I represented 4/9 Livestock, LLC with respect to the Hendricks County re-zoning proceedings by which 58.42 acres of farmland was re-zoned to allow for the operation of 4/9 Livestock, LLC's hog barns.

4. A true and accurate copy of the March 1, 2013 notice letter which I sent to neighboring landowners is attached hereto and identified as Exhibit 8.

Further affiant sayeth not.

I AFFIRM UNDER THE PENALITIES FOR PERJURY THAT THE FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

11-18-16

Date



Ben Comer



CFO
INSPECTION REPORT
 INDIANA DEPARTMENT OF
 ENVIRONMENTAL MANAGEMENT

Inspector's Name:	Joe Williams	
Others Present	Samuel Himself	Owner/Operator
	Clint Himself	Owner/Operator
	Cory Himself	Owner/Operator
	Dan Kinker	JBS United Consultant/Agronomist
Date:	2/19/2014	
Time In:	8:20 AM	
Time Out:	10:05 AM	

General Information

Inspection Type		
Inspection Type	CFO Initial Compliance Assistance	
Facility Information		
Facility Name:	Facility Name: 4/9 Livestock LLC	
Facility Location:	Street Address: 3042 N CR 425 W City: Danville State: IN Zip Code: 46122 County: Hendricks	
Facility Mailing Information:	Mailing Address: 2965 N CR 425 W Mailing City: Danville Mailing State: IN Mailing Zip Code: 46122	
Facility Contact Information:	Contact Person: Clint Himself Contacts Phone Number: (317) 627-9618 (Clint); (317) 445-9741 (Cory) Contact Fax Number: Contact E-mail Address: himself@hotmail.com	
Owner Contact Information	Owner Name: 4/9 Livestock LLC Owner Phone Number: Owner Fax Number: Owner E-mail Address:	
Facility ID		
Log Number	6773	
Animal Types		
Animals Present	Finishers Nursery Pigs Permitted - 8000; Present ~ 700	
Manure Management Systems		
Type of Manure Management System	Below Ground Liquid Storage Tank	
Approved Structures		
Number of Permitted Structures	2	
Number of Observed Structures	2	
Outstanding Issues		
Last Inspection Date:		
Previous Violation(s):	<input type="checkbox"/> Yes <input type="checkbox"/> No	

Checklist

Discharge and Spill Requirements	Approval and Performance Standards
----------------------------------	------------------------------------

<input type="checkbox"/> Unpermitted Discharge <input type="checkbox"/> Spill Not Reported <input type="checkbox"/> Spills Not Managed	<input type="checkbox"/> No Valid Approval <input type="checkbox"/> Approval Condition <input type="checkbox"/> Access Denied
Operational Standards <input type="checkbox"/> Maintenance and Operation <input type="checkbox"/> Improper Freeboard <input type="checkbox"/> Markers Not Maintained <input type="checkbox"/> Unapproved Manure Storage <input type="checkbox"/> Self Monitoring <input type="checkbox"/> Earthen Berm Not Maintained <input type="checkbox"/> Removal of Accumulated Solids <input type="checkbox"/> Vegetation Management System <input type="checkbox"/> Feedlot Run-Off <input type="checkbox"/> Transport & Handling <input type="checkbox"/> Mortality Management	Manure Application Activities <input type="checkbox"/> Staging <input type="checkbox"/> Run-Off <input type="checkbox"/> Ponding <input type="checkbox"/> Spray Irrigation Operation <input type="checkbox"/> Transport and Handling <input type="checkbox"/> Emergency Application, Snow and Frozen Ground <input type="checkbox"/> Manure Applied from Roadway <input type="checkbox"/> Manure Applied to Erodible Soils <input type="checkbox"/> Manure Applied to Saturated Soils
Operating Record <input type="checkbox"/> Requirements <input type="checkbox"/> Farmstead Plan <input type="checkbox"/> Manure Management Plan <input type="checkbox"/> Ground Water Monitoring <input type="checkbox"/> Storm Water Pollution Prevention Plan Certification <input type="checkbox"/> Certification by a Registered Professional Engineer <input type="checkbox"/> Construction Requirements <input type="checkbox"/> Self Monitoring Records <input type="checkbox"/> Emergency Response Plan <input type="checkbox"/> Land Use Agreements <input type="checkbox"/> Justification of Nitrogen Losses <input type="checkbox"/> Land Application Records for 5 Years <input type="checkbox"/> Emergency Land Application of Manure <input type="checkbox"/> Spill Documentation <input type="checkbox"/> Spray Irrigation Plan <input type="checkbox"/> Land Application Monitoring Activities <input type="checkbox"/> Marketing and Distribution Records for 5 Years <input type="checkbox"/> Maintenance Activities on Liquid Manure Storage Facilities <input type="checkbox"/> Setback Waivers <input type="checkbox"/> Approvals	Land Application Records <input type="checkbox"/> Required Acreage for Manure Application <input type="checkbox"/> Manure and Soil Testing <input type="checkbox"/> Apply at Agronomic Rate <input type="checkbox"/> Land Application Records <input type="checkbox"/> Marketing & Distribution <input type="checkbox"/> Information Sheets
Storm Water Management	Exiting Program

<input type="checkbox"/> Applicability	<input type="checkbox"/> Decommissioning Storage Facility
<input type="checkbox"/> Storm Water Management	<input type="checkbox"/> Exiting the Program Requirements
	<input type="checkbox"/> Closing the Operation

General Comments

GENERAL COMMENTS: INITIAL COMPLIANCE REVIEW: An on-site Confined Feeding Operation (CFO) Initial Compliance Review with Samuel Himself, Owner/Operator; Cory Himself; Owner/Operator; Clint Himself, Owner/Operator; Dan Kinker, JBS United; and Joe Williams, IDEM confined feeding compliance inspector to review farm log number 6773 operating records and facilities for compliance with the CFO rules. The operating records were in very good order. The facilities are new and currently have just 700 pigs onsite. This is the last of the first round of grow-outs to go through the buildings; due to that they have had no manure application from the facilities up to this date. First pigs were placed in the buildings on October 6, 2013; first annual manure sample will need to be taken prior to October 6, 2014. All manure is planned to be applied to land owned and operated by the facility owners/operators. The ground around the buildings was snow covered so the inspector could not get good view of ground cover; as in all new construction the ground cover will need to be watched and maintained as necessary this summer to help assure proper storm water management goals. No deficiencies noted during this inspection; the follow-up compliance inspection will be completed after the fall application of manure from this facility.

Description of Violations and Further Actions

The findings noted in this report do not include a compliance evaluation for the submittal of required construction notifications, construction affidavits, facility change notifications, as-built plans, waste storage structure closures, and special compliance monitoring reports or data.

Inspection Documentation

Photograph's Taken	<input checked="" type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Map(s)	<input checked="" type="checkbox"/> Yes <input checked="" type="checkbox"/> No
GPS Location Collected	<input checked="" type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Field Screening Conducted	<input checked="" type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Lab Sample	<input checked="" type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Inspection Results/Actions

Single Media Inspection Results	Follow-up inspection before:
Compliance Assistance Visit	No concerns were observed.
Certificate of Compliance	Due by:

Finalize Inspection

Written Summary of Inspection	Notice of Inspection and/or Verbal Summary Provided. Other/Comment(s) Email Inspection Copy to Clint Himself: cc: Hendricks County Health Department.	
Inspector Information	Inspector:	Joe Williams
	Phone Number:	(317) 407-0083
	Email Address:	jwilliams@idem.in.gov

CO-ALLIANCE, LLP HOG FINISHING CONTRACT

A. Now Comes, Co-alliance, LLP, an Indiana Limited Liability Partnership, whose address is 5250 US Hwy 36, Building 1000; Avon, IN 46123, hereinafter called "Owner" and 4/9 Livestock, L.L.C. an Indiana Limited Liability Corporation, whose address is 2965 N. 425 West, Danville, IN 46122, hereinafter called "Grower," and agree to the following:

WHEREAS the Owner has newly weaned pigs or feeder pigs for which it wants to contract for the growing and caring of said pigs; and

WHEREAS the Grower desires to contract to raise and care for said pigs; and

WHEREAS, the pigs shall at all times be owned by the Owner; and

WHEREAS, the Grower is an independent contractor, and is not an employee or partner with the Owner; and

WHEREAS, the Owner and Grower have agreed to certain terms and conditions regarding the raising of said either newly weaned or feeder pigs.

1. Contract.

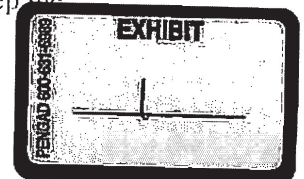
1.1 The Owner and Grower agree to enter into a contract wherein Grower raises and cares for the Owner's pigs in accordance with the terms and conditions of this contract.

1.2 Additional Capital Investments Disclosure Statement: Additional large capital investments may be required of the Grower during the term of the contract.

1.3 The parties agree it will take approximately six months to raise a batch of pigs from the date of delivery from Owner of newly weaned pigs and approximately four months to raise a batch of feeder pigs from the date of delivery to the date of the sale of the last of the pigs in a batch. If newly weaned pigs are being raised, it is acknowledged that the Grower will raise about two batches a year. The parties make no assurances or guarantees that the batches of pigs will be started at the same time each year. One batch of pigs will be raised in a building at a time, unless special permission is given to the Grower to have more than one batch of pigs in a building or room while they are young.

2. Grower's Responsibilities. The Grower shall have the following responsibilities in regard to this contract:

2.1 Facilities. Each building the Grower shall provide must be satisfactory to the Owner and must be designed for the raising of pigs. The Grower shall maintain the inside and outside of each building. The Grower shall keep the



grass mowed outside of a building, and snow plow the driveways so as to provide access to a building. The Grower shall also maintain the said driveways, and gravel such driveways as may be required to as to ensure that such driveways are passable. The Grower shall maintain the premises so that the premises and the building meet all maintenance codes of the local governmental unit. In addition, the Grower shall secure and maintain in full force and effect during the term of this agreement any required federal, state, or local permits which are needed for the growing of pigs or handling of waste. The Grower shall have a generator with sufficient capacity to power all ventilation systems, automatic start with automatic transfer switch, manual start located on premises, or a portable generator within 20 road miles of the facility. The Grower shall insure the facilities curtains are designed to open and allow ventilation in case of power failure. The Grower shall ensure the effectiveness of the generator and all components that control temperature, atmosphere, and air movement within the building.

- 2.2 Electrical Back-Up and Alarm Systems. The Grower shall provide and maintain an electrical back-up systems for a building in which pigs are raised. The Grower shall have an automatic digital alarm system connected to each room containing pigs which is functional on a 24/7 basis which has the capacity to test for temperature changes or loss of power and is capable of alerting someone trained to prevent or minimize a loss. Such systems shall be operational and in good working order during all times that pigs are in such facilities.
- 2.3 Manure. The Grower shall haul out the manure from a building, and from any pits associated with the building, in a timely and responsible manner. The Grower shall dispose of the manure in a manner that is permitted by law, and shall meet all current and future environmental or other regulations governing the disposal of the said manure.
- 2.4 Dead Hogs. The Grower shall remove all dead hogs from a building immediately following the discovery of the animal's death. If there is greater than one-half of one percent (.5%) death of hogs in a single day, Grower shall immediately call Owner by telephone and give a message or leave a message as to the death of such hogs. Such message shall be given so that an autopsy can be ordered by Owner, if Owner desires. Unless an autopsy is ordered, dead hogs shall be disposed of within one (1) day following death, and no accumulation of carcasses shall be permitted on the premises. The Grower shall dispose of the carcasses in a manner that is


permitted by law, and shall meet all environmental or other regulations governing the disposal of said carcasses.

- 2.5 Utilities and Gas Brooders. The Grower shall provide electricity, natural gas or propane for heat and water for the hogs and the facilities. In addition, The Grower shall provide, utilize, and maintain such gas brooders as may be necessary to warm the newly weaned pigs until such time as gas brooders are not longer necessary. It is anticipated that gas brooders may be necessary during cold weather for up to the first five weeks in which newly weaned pigs are being raised.
- 2.6 Labor. The Grower shall provide the labor for stocking the building/buildings, for chores, loading out market pigs, and work throughout the growing period to take care of hogs, and for loading the market pigs out. The grower shall check the hogs at minimum of once per day, but in the case of newly weaned pigs, the Grower shall check the hogs a minimum of twice per day for the first month of raising a batch of newly weaned pigs. The Grower shall treat the sick pigs, and shall carry out all health plans and instructions that may be prescribed by a veterinarian. Grower shall provide two or more people to sort and load the pigs onto truck or trailers for transporting at the time for slaughter.
- 2.7 Access. The Grower shall provide access upon request or demand to a building in which the Owner's pigs are being raised to the Owner, to a veterinarian of the Owner, and to the authorized agents and employees of the Owner. During any default by Grower, Owner shall be given access to the facilities to either provide care for the pigs or to remove the pigs if the Owner deems it necessary to have the pigs removed. The Grower shall not permit any third parties or unauthorized parties to have access to the Owner's pigs. Neither shall the Grower permit the wearing of footwear nor clothing into the facilities in which they are raising pigs for the Owner, unless such footwear or clothing has been sterilized. Any exception to the provisions of this paragraph must be approved in advance by the Owner.
- 2.8 Other Pigs. The Grower shall not raise any pigs other than those of the Owner's without the prior written consent of the Owner. Such consent may be withheld by the Owner if it appears to the Owner that proper precautions cannot be taken to as to control the spread of diseases between such other pigs and the Owner's pigs.
- 2.9 Clean-ups. The Grower shall not take more than one week after the sale of the previous group of pigs to have the buildings thoroughly washed and

disinfected. If Grower fails to have the facility cleaned and disinfected within one week, the Grower will be penalized 1/356 of the annual payment for each delinquent day until the facility has been thoroughly cleaned and disinfected and is ready for pigs.

- 2.10 Standards of Care. The Grower shall provide care for the pigs in a good workmanship-like, professional manner, and all actions of the Grower shall be taken in accordance with any rules, procedures, or policies as may be reasonably provided by the Owner. The Grower shall identify all pigs that are sick or in need of treatment, and shall ensure that treatment is performed for such pigs. The Grower shall ensure that the waters are properly functioning, and the feeders are properly adjusted for optimal growth and efficiency. The Grower shall take or cause all necessary actions to be taken so as to ensure that a building is working in a proper mechanical manner. Grower agrees to abide by Owner's Recommended Management Practices, which are attached hereto as Exhibit A and are hereby incorporated by reference.
- 2.11 Wear and Tear. The Grower shall be liable for all wear and tear that occurs to a building, the waters, the feeders, the mechanical systems, the heaters, the brooders, the slats and the pit.
- 2.12 Security. The Grower shall provide security and shall supervise the premises so as to prevent any pigs from being stolen, abused or mishandled. Grower shall not permit or allow any videos or photographs to be taken of the Owner's livestock without Owner's written permission. Grower agrees any images of Owner's livestock would be solely owned by Owner and could not be released without the written permission of Owner.
- 2.13 Liens and Removal of Pigs. The Grower shall not permit any liens to be placed against the pigs that they are growing for the Owner as the result of any credit application of the Grower, as the result of any legal actions that the Grower may take, or as the result of any financing of the premises on which the pigs are the property of the Owner and that the Grower does not own or have title to or of the said pigs. Grower hereby agrees to cooperate and to sign any form which may be required so as to ensure that any creditor or financial institution for the Owner will have first lien against the pigs.
- 2.14 Liability. Growers with hog quantities up to 3000 head shall insure the facilities and livestock with a minimum per occurrence limit of \$500,000. Growers with hog quantities of 3001-5999 shall insure facilities and livestock with a minimum per occurrence limit of \$1,000,000. Growers

with hog quantities of 6000 head or higher shall insure facilities and livestock with a minimum per occurrence limit of \$1,500,000. Growers are required to name Owner as an additional insured under their policy of insurance and provide Owner proof of naming as additional insured. The Grower shall hold the Owner harmless from any liability which may arise on the said premises to a third-party. It is hereby acknowledged that since the Grower owns the said facilities in which the pigs are to be grown (including the feed bins and the property around such facilities) that it is the Grower's responsibility to insure for damages, including but not limited to damages to a third party and for fire, wind, hail, flood etc... In addition, Grower shall provide such insurance for Grower and the employees of the Grower including Workmen's Compensation, and of any business interruption insurance for Grower, as Grower deems necessary and is required by law and shall provide proof of Workmen's Compensation Insurance coverage to Owner on an annual basis.

- 
- 2.15 Other Actions. In addition, the Grower shall take all other actions as may reasonably be required by Owner for the raising and sale of pigs and for the maintenance of the facilities during the term of this agreement, including but not limited to the releasing of the pigs for sale or shipment to another facility.
- 2.16 Reporting. Grower shall maintain records designed by Owner regarding hog movement, growth, weight, death, feed delivery and related matters. On the last day of each month, Grower shall take a physical inventory of all pigs in Grower's possession pursuant to this Agreement, and shall furnish a written report of such inventory not later than the third (3rd) day of the following month. Grower shall provide Owner a monthly test log for the alarm, ventilating system and back-up generator showing the date, time and result of each test. Any repairs to the alarm, ventilating system and back-up generators shall be documented in the monthly report. If the alarm, ventilation systems or back-up generator has a malfunction for five (5) or more consecutive days, Grower must contact Owner immediately. Said test log report shall be provided to Owner with the monthly inventory report.
- 2.17 Permits. Grower shall be responsible for obtaining all necessary facility construction and operational permits. Including permits for any waste disposal system at the facility, as required under State Law and Administrative Rules. Grower shall assure his facility is in compliance with all such permits, and that all necessary permits are renewed as required.

- 2.18 Environmental Hazards. Grower assumes full and complete responsibility for environmental hazards or conditions, and associated costs and expenses to remedy or resolve such hazards or conditions at Grower's facility or off-site property. Grower is solely responsible for compliance with environmental liabilities incurred as a result of the operation of the hog raising facility including but not limited to operation of waste control system, waste disposal methods, emissions, and disposal or pollution complaints. Grower agrees to indemnify and hold Owner harmless against all claims and expenses including attorney's fees arising out of any environmental law compliance or litigation that are pre-existing or subsequently discovered at Grower's facility whether known or unknown on the execution date of this Agreement.
- 2.19 Uninsured Losses. Any uninsured loss of pigs shall be borne by the Grower if the loss is caused by the negligence of the grower or its employees or by the failure of the Grower's safety systems at the location.
- 2.20 The Grower shall be liable for the cost and expense of performing the work and providing the services that the Grower is required in this agreement.
- 2.21 The Grower will be required to achieve and maintain current PQA Plus certification and Site assessment status. Grower shall provide Owner documentation of this status upon completion and renewal thereafter. Grower further agrees to handle Owner's Hogs in accordance with PQA Plus euthanasia, animal well-being and handling guidelines.
3. **Owner's Responsibilities.** The Owner shall have the following responsibilities:
- 3.1 Pigs. The Owner shall supply the newly weaned or feeder pigs to be raised. The pigs that are to be raised shall at all time be and remain the property of the Owner. The Owner shall ship the pigs to the Grower's facilities, and shall ship the pigs to market at the time of sale, or if necessary, to another facility for finishing.
- 3.2 Inspections and Evaluation Report. The Owner and its representatives shall inspect the pigs and evaluate the Grower's management as necessary during the time that the pigs are at the Grower's facilities. During the course of an inspection, the Owner or the Owner's representatives shall notify the Grower or the Grower's representative of any deficiencies or items that require correction.

- 3.3 **Feed, Products, and Services.** The Owner shall supply and deliver the feed, antibiotics, medications, disinfectants, additives, veterinary services, vaccines, needles and markers.
- 3.4 The Owner shall be liable for the cost and expense of performing the work and providing the services that the Owner is required to provide in this agreement.
- 3.5 Owner reserves the right to immediately terminate this Agreement at anytime if Owner determines in its sole discretion, that the conditions under which the pigs are kept, or the care which the pigs are being given by Grower are substandard for any reason or potentially harmful to said pigs. Owner make take reasonable action under said circumstances, including but not limited to immediate removal of the pigs from Grower's facility or entering Grower's facility for the purpose of assuming day-to-day operations of Grower's facility.
4. **Consideration.** The Owner shall pay the Grower for the reservation of a building in which hogs are to be raised, and for the services to be provided in raising a batch of hogs, in accordance with Exhibit C, which is attached hereto and is hereby incorporated by reference.
5. **Term.** The Term of this Contract is contained in Exhibit C.
6. **Growing and Building Site.** This contract shall be limited to the growing of hogs in the location and buildings described in this contract. The Grower shall not be permitted to grow the Owner's hogs at another location or in another building without the written permission of the Owner, which permission may be denied at the discretion of the Owner.
7. **Cancellation and Default.** Grower has 3 business days after the date this contract is executed to cancel this contract by written notification to Owner. If the Grower fails to perform any term or condition, then it shall be in default under the terms and conditions of this agreement. Upon default the Owner shall have the right to terminate this contract upon thirty (30) days written notice, and following the completion of the growing of a batch of pigs. If the Owner fails to perform any term of condition, then the Owner shall be in default under the terms and conditions of this agreement. Upon default, the Grower shall have the right to terminate this contract upon thirty (30) days written notice, and following the completion of the growing of a batch of pigs. Owner may at its sole discretion determine that immediate cancellation of the contract is required if issues of animal negligence, animal abuse or animal welfare are discovered at the facility.
8. **Attorney Fees.** Each party shall be liable for their own attorney fees to enforce any term or condition of this agreement except as otherwise specified in this agreement.

9. **Damages.** The damages of a party shall be limited to those damages that are prescribed in accordance with the terms and conditions of this agreement.
10. **Interpretation.** The Owner shall have the right to interpret any terms of this contract as to the care of the pigs which are unclear or ambiguous, provided however, that no term shall be interpreted so as to change the plain meaning of any term of this contract.
11. **Notices.** All notices which may be given pursuant to this contract shall be in writing. Notices shall be sent to the addresses as first provide for in this agreement unless a secondary address is provided by one of the parties.
12. **Assignment.** Owner may assign its interest in this contract to another entity. Grower may not assign this contract without written consent of the Owner. Such consent to assignment will not be unreasonably withheld.
13. **Confidentiality.** Grower shall during the terms of this contract and thereafter hold the terms of this contract in confidence. Grower shall not directly or indirectly disclose any information to any person, firm, or corporation except for Grower's accountant, financial legal advisors and or lending institutions or as otherwise required by law.
14. **Effect.** This agreement shall be binding upon the parties, and upon their heirs, successor, and assigns.
15. **Forum.** This agreement shall be interpreted in accordance with the laws of the State of Indiana. The forum for resolving any dispute among the parties to this contract is the Federal Judicial district in which the principal part of the performance under the contract takes place.
16. **Relationship of the Parties.** This Agreement does not and shall not be construed to create a joint venture, partnership or agency relationship between the parties. Grower acknowledges he is an independent contractor. Any expenses incurred by Owner on Grower's behalf may be deducted from Grower's compensation provided that an itemization of such deductions is provided to Grower in writing by Owner at the time the reduced compensation is paid.
17. **Miscellaneous.** The headings of this agreement are for convenience only, and shall not be used to limit or to construe any paragraph of this agreement. This agreement may only be amended by the written agreement of the parties. This agreement and its Exhibits represent the entire agreement of the parties, and replaces any prior oral, written, or implied agreements between the parties. The parties to the agreement hereby represent that they are familiar with raising pigs, and they hereby agree and acknowledge that they understand the risks and the problems associated with raising pigs.

In witness thereof on this 1st day of July, 2012 ^{SB} _{CH} ^{CH} _{CH}

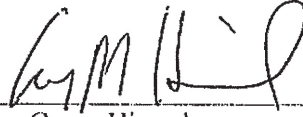
Owner: Co-Alliance, LLP



By: Devy Bucher

Its: Vice-President of Swine
And Animal Nutrition

Grower: 4/9 Livestock, LLC



By: Corey Himsel

Its:

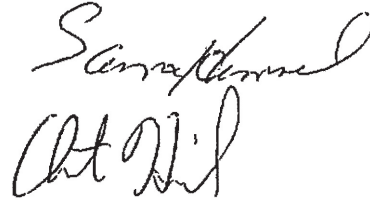


Exhibit A – Grower's Facility Description

The building/buildings to be used to grow hogs under this contract are located at
3402 N CR 425 W (street address), in the County of
Hendricks, State of Indiana and shall be known as Building/Buildings Numbers
1 & 2.

The Following is attached to Exhibit A:

 Legal Description of Property

 ✓ Drawn Diagram of Grower's Facility with barns identified

 Pictures of Grower's Facility with barns identified

 None

Initials of Signatories:

DB

Dewey Bucher

CH SH CH

Grower: 4/9 Livestock, LLC

Exhibit B – Co-Alliance, LLP Recommended Management Practices

1. Pens will be walked daily while observing each pig for sickness or lameness.
2. Pens will be walked in a manner that fosters calmness in the pigs.
3. Sick pigs will be treated and identified as treated upon discovery.
4. Sick pigs that are in need of restraint for proper treatment will be handled according to service personnel recommendations.
5. Euthanasia will be performed according to PQA Plus guidelines.
6. All nipple, cup or pan waters will be observed or checked daily. Any watering device that is not functioning properly will be repaired or replaced upon discovery.
7. Feed pans will be checked daily for blockage and proper feeder settings. Feed settings need to be managed on a daily basis. Forty percent pan coverage is the Golden Rule.
8. Feeder hoppers and feed tanks will be checked daily to insure adequate feed supply.
9. Feed orders are to be placed 24 hours in advance.
10. A rodent and fly control program will be established and maintained according to service personnel recommendations.
11. Load out and hog movement will be done with hurdles, rattle paddles, shakers and minimal use of a hot shot. Under no circumstances will a hot shot be used inside of a pen.
12. Barn record sheets will be kept accurately and up to date. This will include high/low temperatures, water consumption, treatments, deaths and a running inventory of pigs.
13. Use your senses. Your eyes, ears and sense of smell are critical in maintaining a proper environment for the pig.

Initials of Signatories:

DB

Dewey Bucher

CH SH CH

Grower: 4/9 Livestock, LLC

Exhibit C – Term and Consideration

Term:

Grower has 3 business days after the date this contract is executed to cancel this contract by written notification to Owner. After that three day period, this agreement shall be valid and enforceable for 12 years following the signing of this agreement. After the initial term this agreement is an "Evergreen" agreement that renews itself daily automatically. Termination notice, served either by Grower or Owner must be in writing. This agreement will then terminate six (6) months after written notification is received.

Notwithstanding the foregoing, Owner reserves the right to immediately terminate this Contract at any time during the initial term or any subsequent renewal thereafter if Owner determines in its sole discretion, that the conditions under which the pigs are kept, or the care which the pigs are being given by Grower, is sub-standard for any reason, or is potentially harmful to livestock. In such event, Owner may elect to take any action reasonable under the circumstances, including but not limited to: (i) immediate removal of all or a portion of the hogs from Grower's facility; (ii) entering Grower's facility for the purpose of assuming day-to-day operations of Grower's facility to assure continuity of proper care and conditions as set forth in this contract.

Consideration:

Monthly Base Payment \$ 27,333.33

Grower is to be paid from the 15th of the month to the 14th of the month. Full monthly payments will start the month after 15 days of service has been completed. Owner is to pay Grower's Monthly Base Payment by the end of the month. Monthly Base Payment will be prorated upon original stocking date. Full payments will be made until final load-out completion.

\$5,000 Bonus upon completion by Sept 15, 2013 DB

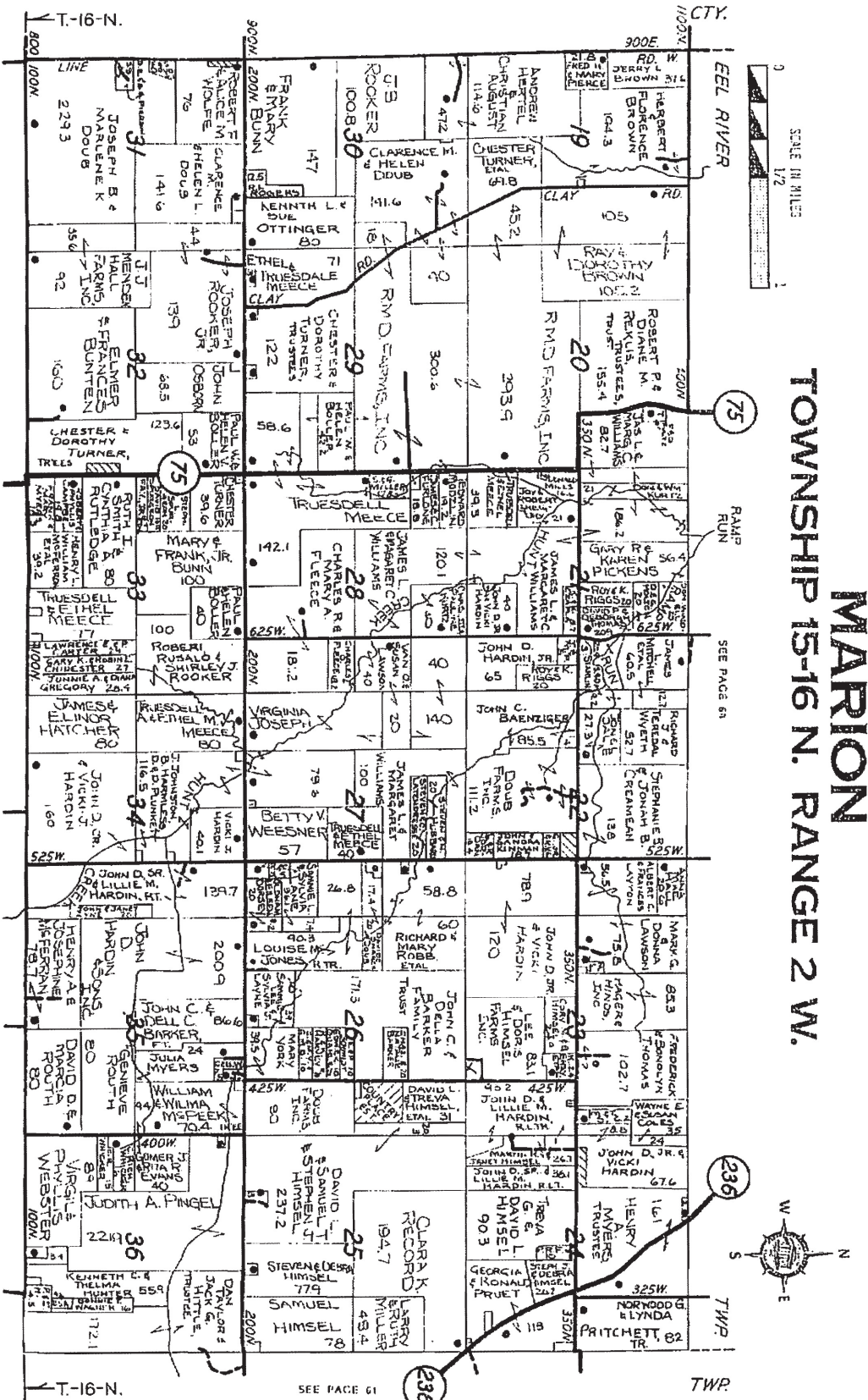
Initials of Signatories:

DB

Dewey Bucher

CH SH CH

Grower: 4/9 Livestock, LLC



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STATE OF INDIANA) IN THE HENDRICKS SUPERIOR COURT
) SS:
HENDRICKS COUNTY) CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and)
SUSAN M. LANNON,)

Plaintiffs,

V.

SAMUEL T. HIMSEL, CORY M.
HIMSEL, CLINTON S. HIMSEL,
4/9 LIVESTOCK, LLC, and
CO-ALLIANCE, LLP,

Defendants.

AFFIDAVIT OF DEWEY BUCHER

I, Dewey Bucher, hereby state:

1. I am over the age of eighteen and have personal knowledge of the representations set forth herein and would testify consistent with this affidavit if called to testify.

2. I am the Swine Division Vice-President of Co-Alliance, LLP.

3. I am familiar with records that Co-Alliance, LLP keeps in the course of regularly-conducted business activity relating to Co-Alliance, LLP's Swine Division, including but not limited to contractual agreements which Co-Alliance, LLP enters with independent growers.


4. On behalf of Co-Alliance, LLP, I negotiated the Hog Finishing Contract between Co-Alliance, LLP and 4/9 Livestock, LLC.

5. A true and accurate copy of the Hog Finishing Contract entered into between Co-Alliance, LLP and 4/9 Livestock, LLC is attached hereto and identified as Exhibit 21.

Further affiant sayeth not.

I AFFIRM UNDER THE PENALITIES FOR PERJURY THAT THE FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

11/17/2016
Date


Dewey Bucher

STATE OF INDIANA	)	IN THE HENDRICKS SUPERIOR COURT
	) SS:	
HENDRICKS COUNTY	)	CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and)
SUSAN M. LANNON,)

Plaintiffs,)
-------------	---

v.)
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SAMUEL T. HIMSEL, CORY M.)
HIMSEL, CLINTON S. HIMSEL,)
4/9 LIVESTOCK, LLC, and)
CO-ALLIANCE, LLP,)

Defendants.)
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DEFENDANT 4/9 LIVESTOCK LLC'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' AMENDED FIRST SET OF INTERROGATORIES

Defendant 4/9 Livestock LLC ("4/9"), pursuant to Indiana Rule of Trial Procedure 33, hereby makes the following responses and objections to Plaintiffs' Amended First Set of Interrogatories.

I. General Objections

4/9's general objections apply to every response. 4/9 has attempted to assert specific objections in each response. These specific objections should not constitute a waiver of any general objection not specifically reasserted. 4/9 expressly reserves the right to object to further discovery into the subject matter of these interrogatories and the right to object to the introduction into evidence of 4/9's answers and responses in any subsequent proceeding or in the trial of this or any other action on any grounds.

1. 4/9 objects to each and every interrogatory to the extent it is overbroad and/or unduly burdensome or expensive to respond to in light of the information's likely benefit, taking into account the needs of the case, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

2. 4/9 objects to each and every interrogatory to the extent it is vague and ambiguous.

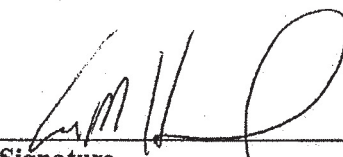
3. 4/9 objects that many of these interrogatories contain multiple discrete subparts. Even adopting a conservative count, this set of interrogatories numbers no fewer than 50 discrete subparts. 4/9 objects that this set exceeds a reasonable amount of interrogatories in light of costs, burden, and the information's likely benefit. Notwithstanding these objections 4/9 has proceeded in good faith to provide information and documentation responsive to Plaintiffs' discovery requests that are related to the claims asserted by the Plaintiffs against the Defendants in this litigation.

4. 4/9 objects to the extent any information or documentation requested by the Plaintiffs does not relate to the CAFO owned by 4/9 Livestock, LLC that is located at 3042 North 425 West, Danville, Indiana and is the subject of Plaintiffs' claims in this litigation against the Defendants.

5. 4/9 objects that to the extent any information requested by Plaintiffs may be ascertained by reference to documents produced by 4/9, where the burden of ascertaining such information is the same for Plaintiffs as it is for 4/9. Where

VERIFICATION AND OATH

Cory M. Himself, under the penalties of perjury, states that he is the President and Managing Member of 4/9 Livestock, LLC and that he has signed the foregoing answers on behalf of 4/9 Livestock, LLC and is duly authorized to do so; that he has read the foregoing responses and knows the contents thereof; that the matters stated in the foregoing documents are not all within his personal knowledge and that there is no individual employee of 4/9 Livestock, LLC that has personal knowledge of all such matters; and said responses were prepared with the assistance of employees and counsel for 4/9 Livestock, LLC, upon which he has relied; that the responses set forth herein, subject to inadvertent and undiscovered errors, are based upon and necessarily limited by the records and information still in existence, presently recollected and thus far discovered in the course of preparation of those responses; and that consequently, 4/9 Livestock, LLC reserves the right to make any changes to the responses if it appears that at any time that omissions or errors have been made or that more accurate information is available; and that subject to the limitations set forth herein, these responses are true and accurate to the best of his knowledge, information and belief.



Signature

Cory M. Himself President

Printed Name and Title

Manure Application Planning

4/9 Livestock, LLC

Manure Produced Per Year

8,000 finishing pigs X .18 cubic feet/day = 1,440 cubic feet/day

1,440 cubic feet/day X 365 days/year = 525,600 cubic feet/year

525,600 cubic feet/year X 7.5 gallons/cubic foot = 3,942,000 gallons per year

Acres Needed Per Year

Yield Goal 200 X 1.2 = 240 lbs. of N needed per acre.

PAN = 39 lbs./1,000 gallon.

Maximum Application Rate (Corn after Corn) = 6,154 gal./acre

Maximum Application Rate (Corn after Beans) = 5,385 gal./acre

Minimum acres needed per year ~

Corn/Corn Rotation = **641 Acres**

Corn/Beans Rotation = **732 Acres**



What IDEM Regulates

Many of the requirements of Indiana's Confined Feeding Program apply to confined feeding operations (CFOs) of all sizes. Some requirements apply only to concentrated animal feeding operations (CAFOs). The United States Environmental Protection Agency only requires states to regulate CAFO-sized farms that intend to discharge liquids to waters of the United States. However, IDEM regulates both CFOs and CAFO-sized farms under Indiana's confined feeding operation rules, which are more stringent than federal regulations.

Activities IDEM Regulates Under the Confined Feeding Law

- Facility design, construction, and maintenance
- Facility setbacks from streams, wells, roads, property boundaries, and residences
- Manure handling and storage
- Manure application rates and setbacks
- Monitoring and record keeping
- Storm water run-off from the production area
- Closure of manure storage structures
- The handling of emergency spills
- Waste digesters located on a CFO regulated site

IDEM Does Not Regulate

Property Values

Contact your local assessor.

Public Road Conditions and Traffic

Contact the [Indiana Department of Transportation](#) about national and state roads and your local highway department about county roads.

Where CFOs and CAFOs Locate

IDEM implements state and federal laws and regulations established for CFOs and CAFOs. IDEM's approval of a new or expanding CFO or CAFO does not relieve farm owners and operators from complying with any local zoning requirements. Contact your local planning and zoning office.

Disposal of Dead Animals

Contact the [Indiana State Board of Animal Health](#).

Ground Water Use

Contact the [Indiana Department of Natural Resources](#).

Odors

IDEM does not regulate odors from farms. The agency provides farmers with guidance on best management practices to reduce odors. IDEM does have a separate permitting process for waste digesters, which can use manure as a feedstock and may be located at a farm. Waste

digesters can improve air quality by reducing odors. IDEM monitors and inspects those facilities on a regular basis.

Vectors (flies, mosquitoes, or other nuisance insects)

Contact your [county health department](#).

STATE OF INDIANA)
) SS:
HENDRICKS COUNTY)

IN THE HENDRICKS SUPERIOR COURT

CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.
HIMSEL, ROBERT J. LANNON, and
SUSAN M. LANNON,

Plaintiffs,

v.

SAMUEL T. HIMSEL, CORY M.
HIMSEL, CLINTON S. HIMSEL,
4/9 LIVESTOCK, LLC, and
CO-ALLIANCE, LLP,

Defendants.

AFFIDAVIT OF SAMUEL HENDERSON

I, Samuel Henderson, hereby affirm under penalty of perjury that:

1. I am one of Plaintiffs' counsel in this case.
2. On December 13, 2016, I visited the IDEM CFO website titled "What IDEM Regulates" in my Firefox web browser, at the URL <http://www.in.gov/idem/cfo/2342.htm>.
3. I then used my computer's native PDF printer to make the printout to which this affidavit is attached.
4. The printout accurately represents the website content as it appeared in my browser at that time.
5. The website bore the official insignia of the Indiana Department of Environmental Management, and showed no sign of tampering.
6. On the date of this affidavit, I again viewed the same website. Its content had not changed.

I verify under penalty of perjury that the above facts are true to the best of my knowledge and belief.

Date: Jan. 20, 2017



Samuel Henderson

**M. Richard Himself
3581 W CR 350 N
Danville, IN 46122
(317) 745-5052
Cell # 317-306-8236**

January 20, 2015

TO: Sam Himself & Family
4230 N CR 200 W
Danville, IN 46122

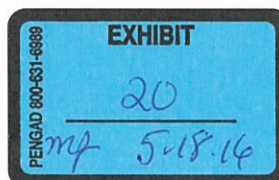
Janet and I are writing this letter to tell you what our lives have been like since your family began raising hogs in the hog barns you constructed very near and upwind from our home.

Unfortunately, because of your hog operation, our lives are miserable, our home is unlivable and we are very uncertain about our future. Because of your hog operation, Janet and I are now constantly coughing and have sore throats. It is so bad she had to move out because she cannot stand to live with these horrible conditions and her doctor advised her to limit her exposure to the noxious fumes. In other words, Janet and I are unable to live together as husband and wife in our home of 20 years.

We were looking forward to retirement with the goal of selling our property and moving to a smaller home. To that end, we listed our property but were unable to sell it because when buyers learned about your hog factory and experienced the smell from it, they lost interest in making us an offer. So, in addition to being forced to live with uncomfortable, smelly and unhealthy conditions due to your hog operation, our beautiful home and property are significantly devalued as well.

Sadly, our family and friends will not visit because of the awful smell. They ask how we stand the smell to which we respond that we can't and that your operation is literally ruining our lives. At the hearings prior to the construction of the hog barns, there was talk about Cory living close to the barns too as somehow supporting the contention that your operation would not impact us. However, because of the Southwest winds and breezes, we are in a more direct line of the prevailing winds than Cory and family. In short, they get the income and we get to suffer with conditions that make our home unlivable and unsellable.

Sam, I am putting you and your family on notice of our situation in hopes that as our neighbor and as family, we can count on you to do the right thing and take steps to eliminate the damage you are causing us. Some suggestions: 1) move the hog barns to another location where they will not impact us or others; 2) stop raising hogs all together.



Plaintiff-000015

We are open to discussing this very critical problem with you. However, if we cannot reach a viable solution, Janet and I will be forced to explore our legal options.

Thank you for your thoughtful consideration. We look forward to hearing from you.

Richard Himself

Janet Himself

CC: Kevin A. Still
President and CEO
Co-Alliance
5250 E. US Hwy 36
Avon, IN 46123



Hendricks County, IN

Summary

Parcel ID 32-05-24-300-001.000-017
Tax Bill ID 009-124622-300001
Map Reference # .
Property Address 3581 W County Road 350 N
 Danville, IN, 46122
Brief Legal Description W Sw 24-16-2w 26.66ac Pt To 23-400-008 &
 300-003 9.27-5
 (Note: Not to be used on legal documents)
Class AGRICULTURAL - CASH GRAIN/GENERAL
 FARM
Tax District Marion Township
Tax Rate Code 74 - Advertised Tax Rate
Property Type 65 - Agricultural
Mortgage Co N/A
Last Change Date



Owner

Himsel Martin R & Janet L
 3581 W County Road 350 N
 Danville, IN 46122

Taxing District

County: Hendricks
Township: MARION TOWNSHIP
State District 017 MARION TOWNSHIP
Local District: 009
School Corp: DANVILLE COMMUNITY
Neighborhood: 5550000 RES ACREAGE DEFAULT-MARION

Site Description

Topography:
Public Utilities:
Street or Road:
Area Quality Static
Parcel Acreage: 26.66

Land

Land Type	Soil ID	Act Front.	Eff. Depth	Size	Rate	Adj. Rate	Ext. Value	Infl. %	Value
9rr		0	0	1.0000	\$22,800.00	\$22,800.00	\$22,800.00	\$0.00	\$22,800.00
PUBLIC ROAD/ROW		0	0	.11	\$1,960.00	\$1,960.00	\$215.60	(\$100.00)	\$0.00
TILLABLE LAND	Bs	0	0	1.70	\$1,960.00	\$2,509.00	\$4,265.30	\$0.00	\$4,270.00

Land Type	Soil ID	Act Front.	Eff. Depth	Size	Rate	Adj. Rate	Ext. Value	Infl. %	Value
NONTILLABLE LAND	Bs	0	0	1.18	\$1,960.00	\$2,509.00	\$2,960.62	(\$60.00)	\$1,180.00
FARM BUILDINGS	CrA	0	0	.40	\$1,960.00	\$1,999.00	\$799.60	(\$40.00)	\$480.00
TILLABLE LAND	CrA	0	0	1.35	\$1,960.00	\$1,999.00	\$2,698.65	\$0.00	\$2,700.00
NONTILLABLE LAND	CrA	0	0	1.41	\$1,960.00	\$1,999.00	\$2,818.59	(\$60.00)	\$1,130.00
NONTILLABLE LAND	CsB2	0	0	2.22	\$1,960.00	\$1,842.00	\$4,089.24	(\$60.00)	\$1,640.00
TILLABLE LAND	CsB2	0	0	1.16	\$1,960.00	\$1,842.00	\$2,136.72	\$0.00	\$2,140.00
FARM BUILDINGS	CsB2	0	0	.07	\$1,960.00	\$1,842.00	\$128.94	(\$40.00)	\$80.00
TILLABLE LAND	Gn	0	0	.16	\$1,960.00	\$1,999.00	\$319.84	\$0.00	\$320.00
NONTILLABLE LAND	Gn	0	0	8.55	\$1,960.00	\$1,999.00	\$17,091.45	(\$60.00)	\$6,840.00
TILLABLE LAND	MeA	0	0	.36	\$1,960.00	\$1,999.00	\$719.64	\$0.00	\$720.00
NONTILLABLE LAND	MeA	0	0	1.26	\$1,960.00	\$1,999.00	\$2,518.74	(\$60.00)	\$1,010.00
TILLABLE LAND	MmB2	0	0	.36	\$1,960.00	\$1,744.00	\$627.84	\$0.00	\$630.00
NONTILLABLE LAND	MmB2	0	0	2.04	\$1,960.00	\$1,744.00	\$3,557.76	(\$60.00)	\$1,420.00
FARM BUILDINGS	MmB2	0	0	1.81	\$1,960.00	\$1,744.00	\$3,156.64	(\$40.00)	\$1,890.00
NONTILLABLE LAND	Sh	0	0	.83	\$1,960.00	\$2,176.00	\$1,806.08	(\$60.00)	\$720.00
TILLABLE LAND	Sh	0	0	.01	\$1,960.00	\$2,176.00	\$21.76	\$0.00	\$20.00
NONTILLABLE LAND	Wh	0	0	.68	\$1,960.00	\$2,176.00	\$1,479.68	(\$60.00)	\$590.00

Residential Dwellings

Description	Single-Family Residence1
Story Height	1.5
Style	
Finished Area	1960
# Fireplaces	0
Heat Type	Central Warm Air
Air Cond	1960
Bedrooms	4
Living Rooms:	0
Dining Rooms:	0
Family Rooms:	0
Finished Rooms:	7
Full Baths	1
Full Bath Fixtures	3
Half Baths	0
Half Bath Fixtures	0
Kitchen Sinks	1
Water Heaters	1
Add Fixtures	0

Floor	Construction	Base	Finish
1	Wood Frame	1160	1160
1/2	Wood Frame	800	800
B		800	0
C		360	0

Features	Area
Patio, Concrete	322
Patio, Concrete	281
Porch, Enclosed Frame	272
Porch, Enclosed Frame	120
Stoop, Masonry	16

Improvements

Descr	PC	Grade	Year Built	Eff Year	Cond	LCM	Size	Nbhd Factor	Mrkt Factor
Single-Family Residence1	100	C-1	1926	1971	A	1.01	1960	1	1.255
SILO	100	D	1940	1940	F	1.01	314	1	0.8
Feed Lot1	100	D	1940	1940	P	1.01	6060	1	0.8
Feed Lot2	100	D	1940	1940	P	1.01	334	1	0.8
Detached Garage	100	D	1940	1940	A	1.01	440	1	0.8
Barn, Bank & Flat (T2)	100	D	1940	1940	F	1.01	1344	1	0.65
Barn, Pole (T3)	100	D	1940	1940	P	1.01	1650	1	0.65
Lean-To	100	D	1940	1940	P	1.01	416	1	0.8
Barn, Pole (T3) 2	100	D	1940	1940	A	1.01	1920	1	0.65
Barn, Pole (T3) 3	100	D	1940	1940	F	1.01	416	1	0.65
Lean-To 2	100	D	1940	1940	F	1.01	768	1	0.8

Descr	PC	Grade	Year Built	Eff Year	Cond	LCM	Size	Nbhd Factor	Mrkt Factor
Utility Shed	100	D	1940	1940	A	1.01	240	1	0.8

Transfers

Date	New Owner	Doc ID	Book/Page	Sale Price
	HIMSEL, MARTIN R & JANET L			\$0.00

Transfer History

Date	Transfer From	Instrument	Book	Page	Doc Nbr
9/11/1998	Unknown At Conversion	Conversion	0	0	

Valuation

Assessment Year	2016	2015	2014	2013	2012
Reason	ANNUAL ADJUSTMENT	GENERAL REVALUATION	ANNUAL ADJUSTMENT	GENERAL REVALUATION	GENERAL REVALUATION
As Of Date	6/29/2016	7/16/2015	6/18/2014	6/23/2013	7/22/2012
Land	\$50,600	\$51,400	\$95,200	\$92,600	\$91,500
Land Res (1)	\$22,800	\$22,400	\$23,800	\$23,800	\$23,800
Land Non Res (2)	\$27,800	\$29,000	\$18,100	\$15,500	\$14,400
Land Non Res (3)	\$0	\$0	\$53,300	\$53,300	\$53,300
Improvement	\$158,500	\$136,600	\$140,900	\$133,700	\$133,800
Imp Res (1)	\$134,000	\$106,500	\$108,500	\$101,300	\$101,700
Imp Non Res (2)	\$0	\$0	\$0	\$0	\$0
Imp Non Res (3)	\$24,500	\$30,100	\$32,400	\$32,400	\$32,100
Total	\$209,100	\$188,000	\$236,100	\$226,300	\$225,300
Total Res (1)	\$156,800	\$128,900	\$132,300	\$125,100	\$125,500
Total Non Res (2)	\$27,800	\$29,000	\$18,100	\$15,500	\$14,400
Total Non Res (3)	\$24,500	\$30,100	\$85,700	\$85,700	\$85,400

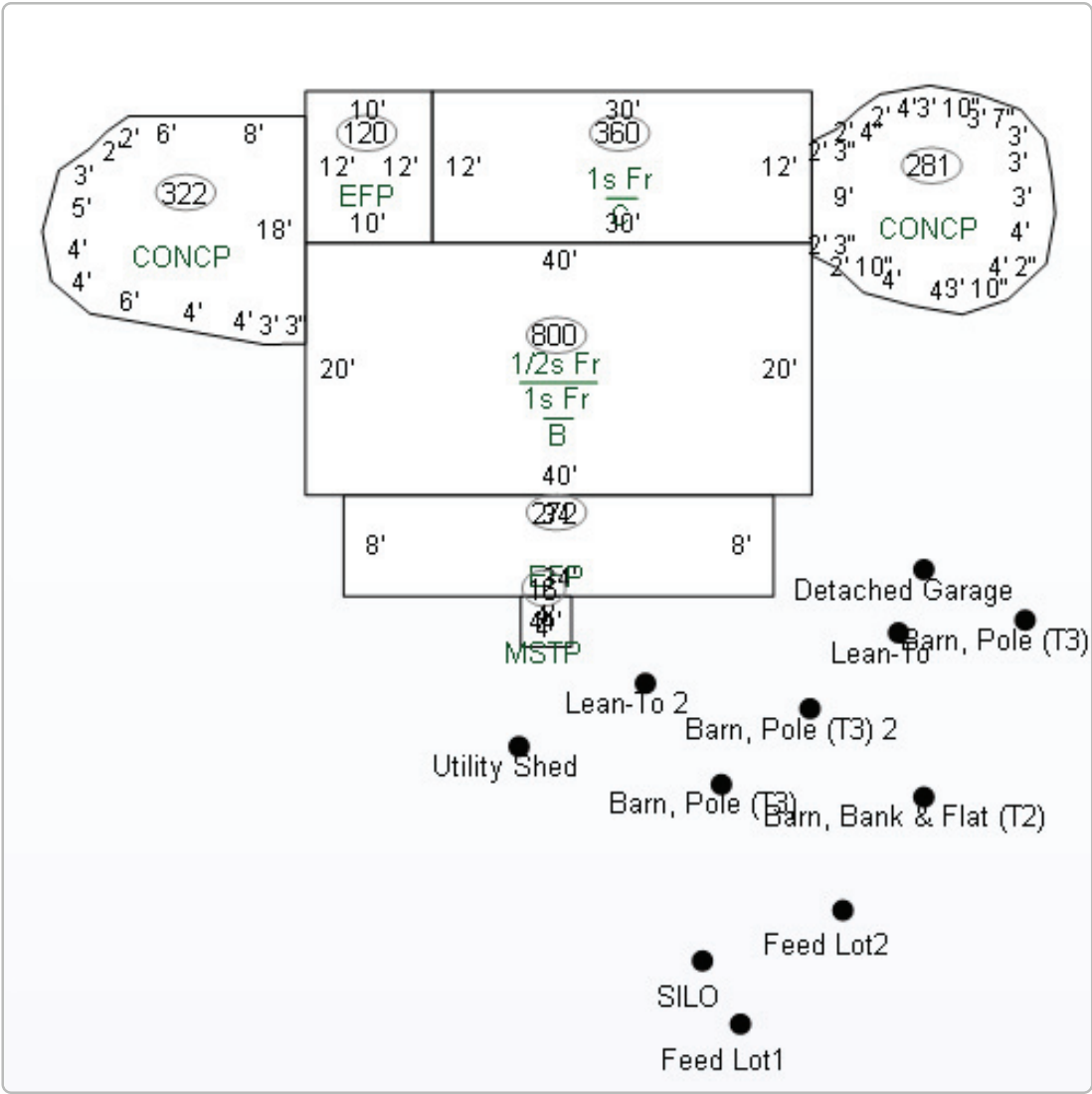
Taxes

[Click here to view Hendricks County tax data](#)

Photos




Sketches



No data available for the following modules: Commercial Buildings.

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STATE OF INDIANA)	IN THE HENDRICKS SUPERIOR COURT
) SS:	
HENDRICKS COUNTY)	CAUSE NO. 32D04-1510-PL-000150
MARTIN RICHARD HIMSEL, JANET L.)	
HIMSEL, ROBERT J. LANNON, and)	
SUSAN M. LANNON,)	
)	
Plaintiffs,)	
)	
v.)	
)	
SAMUEL T. HIMSEL, CORY M.)	
HIMSEL, CLINTON S. HIMSEL,)	
4/9 LIVESTOCK, LLC, and)	
CO-ALLIANCE, LLP,)	
)	
Defendants.)	

AFFIDAVIT OF SAMUEL HENDERSON

I, Samuel Henderson, hereby affirm under penalty of perjury that:

1. I am one of Plaintiffs' counsel in this case.
2. On January 20, using the search interface of the Hendricks County GIS website, which is maintained by Schneider Corporation on behalf of Hendricks County, I located and viewed the property overview page for the Richard and Janet Himsel residence, at <https://beacon.schneidercorp.com/Application.aspx?AppID=327&LayerID=3469&PageTypeID=4&PageID=2297&Q=381860518&KeyValue=32-05-24-300-001.000-017>.
3. I then used my computer's native PDF printer to make the printout to which this affidavit is attached.
4. The printout accurately represents the website content as it appeared in my browser at that time, and as it had appeared on multiple previous visits over recent months.

5. The GIS website was linked from the official website of the Hendricks County Assessor, bore the official insignia of the Schneider Corporation, and showed no sign of tampering. The information shown was identical to past visits over previous months.

I verify under penalty of perjury that the above facts are true to the best of my knowledge and belief.

Date: Jan. 20, 2017



Samuel Henderson

STATE OF INDIANA)
)
COUNTY OF HENDRICKS) SS: IN THE HENDRICKS SUPERIOR COURT
 CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and)
SUSAN M. LANNON,)

Plaintiffs,)

vs.)

SAMMUEL T. HIMSEL, CORY M.)
HIMSEL, CLINTON S. HIMSEL,)
4/9 LIVESTOCK, LLC, and)
CO-ALLIANCE, LLP,)

Defendants.)

FILED
2018 AUG -8 AM 9:20
CLERK OF SUPERIOR COURT
HENDRICKS COUNTY INDIANA

**PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE
AND COMPENSATORY RELIEF AND ACTION FOR INVERSE CONDEMNATION**

NOTICE OF CLAIM THAT TWO INDIANA STATUTES ARE UNCONSTITUTIONAL

NOW COME Plaintiffs, MARTIN RICHARD HIMSEL, JANET L. HIMSEL (“Himsel Plaintiffs”), ROBERT J. LANNON and SUSAN M. LANNON (“Lannons”), by counsel Kim E. Ferraro with the Hoosier Environmental Council, and complaining of the Defendants, SAMMUEL T. HIMSEL, CORY M. HIMSEL and CLINT HIMSEL, 4/9 LIVESTOCK, LLC, and CO-ALLIANCE, LLP, hereby allege as follows:

NATURE OF THE ACTION

1. Like many of Indiana’s rural citizens, Plaintiffs are victims of the dramatic transformation of agriculture from farming to big industry. Within the last several decades, the United States went from producing food on traditional farms owned by farm families, to producing food from highly mechanized, industrial operations controlled by a handful of giant corporations.¹

¹ USDA, *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, Economic Research Service, EIB-3, 2 (2005) available at http://www.ers.usda.gov/media/259572/eib3_1_.pdf.

Now, instead of raising animals for food in pastures, the standard method is to intensively confine animals, sometimes by the hundreds of thousands, in livestock production factories known as concentrated animal feeding operations or confined feeding operations (collectively "CAFOs").

2. CAFOs generate enormous quantities of biological waste including feces and urine, as well as a variety of dangerous air pollutants including ammonia, hydrogen sulfide, methane, nitrous oxide, volatile organic compounds and particulate matter.² These pollutants pose serious health threats to people who live near CAFOs, including bronchitis, pulmonary disease, asthma, and respiratory distress syndrome, irritation to the eyes, nose, and throat, anxiety and depression, memory loss, heart disease, and even death.³ In addition, CAFOs produce extremely noxious odors from a complex mixture of ammonia, hydrogen sulfide, and volatile and semi-volatile organic compounds – odorous compounds that smell much worse than odors associated with traditional farms.⁴ And, unlike traditional farm smells, the extreme odors from CAFOs greatly diminish quality of life, reduce property values, and alter the daily activities of people who live nearby⁵ -- people including the Plaintiffs.

3. Plaintiffs are among the growing number of rural citizens who are unjustly suffering from the pollution and life disrupting effects of CAFOs. Specifically, a CAFO with 8,000 hogs that on average produce the equivalent amount of raw sewage produced by a small town now operates on property very near Plaintiffs' homes. Every day, these 8,000 hogs generate thousands of gallons of manure along with emissions of ammonia, volatile fatty acids, amines, and reduced sulfur compounds that travel with the prevailing winds to Plaintiffs' homes and properties.

² Nat'l Assoc. of Local Bds. of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, 5-7 (2010) available at http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

³ *Id.*

⁴ *Id.* at 7.

⁵ Donham, et. al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, *Environmental Health Perspectives*, 115(2), 318-319 (2007) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817697/pdf/ehp0115-000317.pdf>.

4. Despite the well-known harm of siting such a massive CAFO too close to where people live, the Defendants in this case decided to build their hog factory upwind and less than a quarter mile from the Himsel Plaintiffs' home, and less than a half mile from the Lannons' home. Due to the predictable and repeated invasion of noxious odors and air emissions released from the CAFO, the Plaintiffs' homes are now at times unlivable, their properties devalued, and their outdoor-oriented, rural way of life greatly diminished.

5. Also like other rural citizens harmed by odors and air emissions from CAFOs, Plaintiffs have nowhere to turn for help. Although there are approximately 2,000 CAFOs and CFOs in Indiana, federal and state regulations require only that these livestock operations restrict their water pollution discharges but not the dangerous air pollution and odors they produce.⁶

6. Making matters worse, Indiana has two "Right to Farm" laws that, despite the name, serve only to protect the interests of the corporate-controlled livestock industry, not traditional farmers. The Right to Farm Act ("RTFA") provides livestock operations that harm their neighbors with special legal immunity when the neighbors seek relief in court.⁷ In turn, Senate Enrolled Act 186 ("SEA 186") enacted in 2014 requires regulators and courts to "construe" state law so as not to interfere with the industry's "right" to use its preferred "livestock production practices," which include the use of CAFOs, regardless of the harm those practices cause.⁸

7. No other industry or economic sector enjoys the privilege of knowing state government agencies and courts must interpret the law to serve and protect that industry's special interests. Accordingly, Plaintiffs bring this action to challenge the constitutionality of Indiana's

⁶ Indiana Dept. of Environmental Mgmt., Confined Feeding Operations (describing "What IDEM Does Not Regulate") at <http://www.in.gov/idem/landquality/2349.htm#idem-no-regulate>; see also, Hoover, *Can't You Smell That Smell? Clean Air Act Fixes For Factory Farm Pollution*, Stanford Journal of Animal Law & Policy, Vol. 6 (2013) available at https://journals.law.stanford.edu/sites/default/files/print/issues/hoover_1.pdf

⁷ Ind. Code § 32-30-6-9.

⁸ Ind. Code § 15-11-2-6(a)

unjust, "Right to Farm" laws, which violate Plaintiffs' equal protection and due process rights, and amount to inverse condemnation and an unconstitutional taking of their constitutionally protected property rights. Plaintiffs also bring this action to hold the Defendants accountable for the harm they have inflicted on Plaintiffs and to prevent the Defendants from causing further harm.

PARTIES

8. Plaintiffs MARTIN RICHARD HIMSEL and JANET L. HIMSEL ("the Himsel Plaintiffs") are citizens of the State of Indiana who, since 1994 to the present date, have owned and resided on certain real property in Hendricks County located at 3581 West 350 North, in Danville, Indiana ("Himsel property"). The Himsel property is a 26-acre farm where the Himsel Plaintiffs engaged in traditional farming including raising livestock and growing various crops until 2000, when they decided to retire. Plaintiff MARTIN RICHARD HIMSEL grew up on the Himsel property, which was previously owned and farmed by his parents. As farmers, the Himsel Plaintiffs are accustomed to the usual smells and odors associated with living in an agricultural area.

9. Plaintiffs ROBERT J. LANNON and SUSAN M. LANNON ("the Lannons") are citizens of the State of Indiana, owning and residing on certain real property in Hendricks County located at 3868 West 350 North in Danville, Indiana ("Lannon property") since 1971. The Lannon property is in a rural area and surrounded by farms. As such, the Lannons are accustomed to the usual smells and odors associated with living in an agricultural area, having done so for more than forty years.

10. Defendant 4/9 LIVESTOCK, LLC ("4/9") is a Domestic Limited Liability Company organized under the laws of the State of Indiana and located at 2965 North 425 West, Danville, Indiana. By and through its members, agents, servants and/or employees including but

not limited to the Defendants SAMMUEL T. HIMSEL, CORY M. HIMSEL, and CLINTON S. HIMSEL ("the Himsel Defendants"), 4/9 owns, controls, manages and/or operates a confined feeding operation located at 3042 North 425 West, in Danville, Indiana ("the CAFO") subject to the requirements of a "Hog Finishing Contract" with the Defendant CO-ALLIANCE, LLP ("the Contract"). The CAFO is located approximately 1,400 feet to the south and west of the Himsel Plaintiffs' property and approximately, 2,500 feet to the south of the Lannons' property.

11. Defendant SAMMUEL T. HIMSEL is a citizen of the State of Indiana who resides at 4230 North 200 West in Danville, Indiana and acting individually, and/or as member, agent, servant and/or employee of 4/9, owns, controls, manages and/or operates the CAFO and is responsible for day-to-day operations and management of the CAFO subject to the requirements of the Contract that 4/9 has with the Defendant CO-ALLIANCE, LLP.

12. Defendant CORY M. HIMSEL is a citizen of the State of Indiana who resides at 2965 North 425 West in Danville, Indiana and acting individually, and/or as member, agent, servant and/or employee of 4/9, owns, controls, manages and/or operates the CAFO and is responsible for day-to-day operations and management of the CAFO subject to the requirements of the Contract that 4/9 has with the Defendant CO-ALLIANCE, LLP.

13. Defendant CLINTON S. HIMSEL is a citizen of the State of Indiana who resides at 3202 West 200 North in Danville, Indiana and acting individually, and/or as member, agent, servant and/or employee of 4/9, owns, controls, manages and/or operates the CAFO and is responsible for day-to-day operations and management of the CAFO subject to the requirements of the Contract that 4/9 has with the Defendant CO-ALLIANCE, LLP.

14. Defendant CO-ALLIANCE, LLP ("CO-ALLIANCE") is a Domestic Limited Liability Partnership organized under the laws of the State of Indiana with its principle place of

business located at 5250 E. US Highway 36, Building 1000, Avon, Indiana. CO-ALLIANCE owns the hogs that are warehoused at the CAFO and exercises substantial oversight and operational control of the CAFO through the Contract with 4/9.

JURISDICTION AND VENUE

15. Jurisdiction and venue are proper in this Court as the Plaintiffs and the Himself Defendants all reside in Hendricks County, the events and omissions giving rise to the claims alleged herein occurred within Hendricks County, and the property that is the subject of this action is situated in Hendricks County.

16. Plaintiffs' action for declaratory relief is authorized by Indiana Code § 34-14-1-1 and Indiana Trial Rule 57.

17. Plaintiffs' action for inverse condemnation is authorized by Indiana Code § 32-24-1-16.

GENERAL ALLEGATIONS

18. In 2008, Hendricks County enacted a new Zoning Ordinance ("the 2008 Ordinance") that established new zoning districts and eliminated others. Two new zoning districts that were established include the "agriculture/residential" (AGR) district and the "agriculture/intense" (AGI) district. The stated intent for establishing the AGR district is:

to permit the establishment of individual single-family dwellings while maintaining a primarily rural character. This can serve to protect land best suited for agricultural use from the encroachment of incompatible land uses.⁹

The stated intent for establishing the AGI district is:

to provide adequate and appropriate locations for intense agricultural uses such as CAFO's or agricultural businesses that may emit intense odors, vibrations, air pollution, or other disruptions. The intention is to protect both the agricultural use and residential or commercial property owners from nuisance claims.¹⁰

⁹ Ordinance Section 4.7(A), *AGR-District Intent*

¹⁰ Ordinance Section 4.6(A), *AGI-District Intent*

The AGR district replaced the previously established “Rural Residential” (R-A) district, which was eliminated by enactment of the 2008 Ordinance.¹¹

19. Furthering the stated purpose of establishing the new AGR and AGI districts, “High Intensity Uses” including CAFOs are not allowed in the AGR district, even by special exception.

20. The Plaintiffs’ properties and the property on which the CAFO is now located (“the CAFO property”) were all zoned R-A prior to the 2008 Ordinance revision, and then became AGR zoned properties after the 2008 Ordinance revision.

21. Despite the stated purpose of establishing separate AGR and AGI districts, and knowing that Plaintiffs’ properties are zoned AGR, the Defendants sought and obtained approval in March of 2013 from the Hendricks County Commissioners to rezone the CAFO property from AGR to AGI so that the Defendant 4/9, by and through its agents, servants and/or employees including but not limited to the Himsel Defendants, acting individually and/or as agents, servants and/or employees of 4/9 could build and operate the CAFO subject to the Contract with CO-ALLIANCE. In their application submitted by Defendant Samuel T. Himsel, the Defendants represented that “the nearest neighbor to the CAFO property is approximately one-half mile away” despite the fact that there are several residential homes within a quarter-mile of the CAFO, including the Himsel Plaintiffs’ home.

22. During the rezoning process, Plaintiffs and other remonstrators expressed their concerns that the CAFO would greatly reduce their property values, produce noxious odors and air emissions for which there are no regulations, eliminate their ability to enjoy the outdoors, and interfere with their right to comfortable use and enjoyment of their own properties.

¹¹ Ordinance Section 4.2(A), Table 4.1: *Agricultural and Residential Transition Districts*.

23. The Defendants dismissed these concerns and represented to the Hendricks County Plan Commission that “there is not enough data to regulate air emissions from livestock operations,” that there are “no specific studies” about the nature of odors from hog CAFOs, and that there is “no direct correlation” between CAFOs and property value loss.¹²

24. Contrary to Defendants’ representations, there is significant data from numerous scientific and industry-funded studies conducted over decades showing that hog CAFOs generate noxious odors, produce dangerous air emissions, and significantly reduce property values for people who live nearby.¹³ Indeed, by enacting the 2008 Ordinance, Hendricks County recognizes that CAFOs “emit intense odors, vibrations, air pollution, or other disruptions” which is the very reason the AGI district was created. Nevertheless, based on the Defendants’ representations that the CAFO would be held to a “zero discharge standard” and required to have “state of the art environmental safeguards” by the Indiana Department of Environmental Management (“IDEM”), the County Commissioners approved the Defendants’ rezoning request.

25. Thereafter, on May 31, 2013, IDEM approved Defendant 4/9’s application for a “CFO Approval” (as opposed to a permit) under Indiana’s CFO Rule.¹⁴ Defendants’ misleading representations aside, the CFO rule offers no help to people impacted by odors and air emissions from CAFOs because the rule applies to water pollution discharges only and allows CAFOs,

¹² Hendricks County Plan Commission, Minutes of March 12, 2013 Public Hearing on ZA 418/13, zoning amendment application of Samuel T. Himsel, pp. 167-174 (quoting testimony of Josh Trenary, Attorney with the Indiana Pork Producers Association and Dan Kinker, Environmental Consultant with JBS United, Inc.)

¹³ See e.g., Wing, Horton, et. al., *Air pollution and odor in communities near industrial swine operations*, Environ Health Perspect, 116(10), 1362-1368 (2008); Wilson, S. M., & Serre, M. L., *Use of passive samplers to measure atmospheric ammonia levels in a high-density industrial hog farm area of eastern North Carolina*, Atmospheric Environment, 41(28), 6074-6086 (2007); Schiffman, Miller, et. al., *The effect of environmental odors emanating from commercial swine operations on the mood of nearby residents*, Brain Research Bulletin, 37(4), 369-375 (1995); Schiffman, Bennett, et. al., *Quantification of odors and odorants from swine operations in North Carolina*, Agricultural and Forest Meteorology, 108(3), 213-240 (2001); Herriges, Secchi, et. al., *Living with hogs in Iowa: The impact of livestock facilities on rural residential property values*, Land Economics, 81, 530-545 (2005).

¹⁴ 327 IAC 19.

regardless of the size or number of animals, to be built as close as 100 feet from property lines, and 400 feet from homes and schools.¹⁵

26. On July 1, 2013, the Himsel Defendants acting individually, and/or as agents, servants and/or employees of 4/9 entered into the Contract with CO-ALLIANCE for the housing, feeding, and raising of pigs owned, supplied and fed by CO-ALLIANCE. The Contract directs 4/9 by and through its agents, servants and employees including the Himsel Defendants to undertake activities and operations that CO-ALLIANCE and the Himsel Defendants knew or should have known would generate noxious odors, produce dangerous air emissions, and significantly reduce property values for people who live near the CAFO, including the Plaintiffs.

27. On September 19, 2013, the Himsel Defendants acting individually, and/or as agents, servants and/or employees of 4/9 completed construction of the CAFO in accordance with the terms of the Contract with CO-ALLIANCE. The CAFO includes two 33,500 square foot buildings with slatted floors and ventilation fans for confining 4,000 hogs from "wean to finish" in each building, and two concrete pits underneath the buildings to collect and store in excess of four million gallons of liquid hog waste. The CAFO also includes surrounding land parcels near Plaintiffs' homes that are owned by or in the control of the Himsel Defendants for spreading the CAFO's hog waste through the "drag line" or "hose" method.

28. According to IDEM records, the Defendants populated the CAFO with CO-ALLIANCE's hogs on or about October 6, 2013. Since that time, the Himsel Defendants acting individually and/or as agents, servants and/or employees of 4/9, and subject to the requirements of the Contract with CO-ALLIANCE, have continued to confine up to 8,000 hogs at a time, collect

¹⁵ 327 IAC 19-12-3

and store millions of gallons of feces and urine generated by the hogs, and dispose of the collected feces and urine on fields near Plaintiffs' properties.

29. The Defendants' animal confinement and waste collection and disposal practices at the CAFO as described in the foregoing paragraph, cause noxious odors from emissions of ammonia, volatile fatty acids, amines, and reduced sulfur compounds that travel with the prevailing winds to regularly invade Plaintiffs' homes and properties.

30. Indeed, as a large CAFO with 8,000 hogs, the CAFO is subject to the emergency release notification requirements of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 *et. seq.* ("EPCRA"). 40 C.F.R. § 355.31(g). The responsibility for large CAFOs that release in excess of 100 pounds of ammonia per day to report those releases under section 304 of EPCRA was reaffirmed by the EPA in December of 2008. 73 Fed.Reg. 76948. 76952-53. Each 24-hour period constitutes a "day" of violation for failing to report.

31. Since at least 2006, the Defendants had and have knowledge, actual or constructive, that ammonia -- an extremely hazardous substance under EPCRA -- is generated in the course of, or as a byproduct of, swine production, and is released from large hog CAFOs like the CAFO at issue.

32. The Defendants are members of the National Pork Producers Council ("NPPC"), a national swine industry lobbying and advocacy group. In January of 2009, the NPPC distributed to its members the "Koelsch and Stowell Ammonia Emissions Estimator," an ammonia-estimating methodology recommended by both the EPA and the NPPC along with an EPCRA reporting worksheet, and fact sheet containing detailed guidance. NPPC continues to make those documents, including the Koelsch and Stowell Ammonia Emissions Estimator available on its website.

33. The Koelsch and Stowell Ammonia Emissions Estimator provided to the Defendants indicates that the Defendants' animal confinement and waste collection and disposal practices at the CAFO regularly release greater than 100 pounds of ammonia into the air per day, with high-end projections estimating that the CAFO releases 320 pounds of ammonia per day – more than three times the daily EPCRA reporting threshold for ammonia.

34. The Agency for Toxic Substances and Disease Registry (ATSDR), a part of the Department of Health and Human Services, characterizes ammonia as a toxin. According to the ATSDR and the National Research Council's Acute Exposure Guideline Levels (AEGL) report for ammonia, exposure to airborne ammonia can, at lower concentrations, result in eye discomfort, odor irritation, headache, dizziness, upper respiratory and throat irritation, nasal dryness, and a "feeling of intoxication," while at higher concentrations it can cause moderate to severe respiratory effects, general discomfort, increased odor intensity, and increased irritation to the eyes, nose, throat, and chest. Eventually, as concentrations increase, health problems associated with ammonia exposure can progress to respiratory scarring, including tracheal and nasopharyngeal burns; bronchiolar/alveolar swelling; hyperventilation; reflex throat closure; and death.

35. Consistent with these known health effects, Plaintiffs are at times unable to go outdoors without gagging and having to cover their nose and mouth. The stench from ammonia and other odorous compounds released from the Defendants' animal confinement and waste collection and disposal practices at the CAFO is so obnoxious and intense that it burns their noses, throats and eyes and makes it difficult to breathe. Even with the windows and doors shut, the putrid smells and contaminants at times permeate the inside of Plaintiffs' homes often making it difficult for them to live, eat and sleep. Social and family gatherings have been disrupted because of the smell. At times, the smell inside their homes is so bad they are forced to leave for periods at a time

to escape. And, conditions have become so uncomfortable for Plaintiff Janet Himsel that she moved out of the Himsel Plaintiffs' home and now lives with her daughter.

36. The Plaintiffs have informed the Defendants of the intolerable living conditions created by the noxious air emissions from Defendants' animal confinement and waste collection and disposal practices at the CAFO. Nevertheless, the Defendants have refused to take any action other than using an ineffective pit additive, to reduce the noxious odors and air emissions generated by those practices, or implement any measures to abate the continuing harm to Plaintiffs caused by those practices.

37. Prior to the Defendant's construction of the CAFO, the CAFO property was historically used for raising crops such as corn and soybeans and did not in any way interfere with the Plaintiffs' use and enjoyment of their properties or cause odors and air emissions to invade Plaintiffs' properties.

COUNT I – NUISANCE

38. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 37 above as though fully set forth in this Count I.

39. Defendants' past and ongoing animal confinement and waste collection and disposal practices at the CAFO have created conditions on the Plaintiffs' properties that: are injurious to the health of Plaintiffs; are indecent and offensive to the senses of Plaintiffs; obstruct the free use of properties owned by Plaintiffs; and interfere with Plaintiffs' comfortable enjoyment of life and property and, therefore, constitute a nuisance as defined in Ind. Code § 32-30-6-6.

40. The Defendants had and have a duty not to use the CAFO property to the detriment of neighboring landowners, including the Plaintiffs. Despite this duty, and in blatant disregard for Plaintiffs' health, safety, well-being, and property, Defendants decided to construct the CAFO and

conduct animal confinement and waste collection and disposal practices in close proximity and upwind of Plaintiffs' homes even though Defendants knew or should have known that doing so would predictably cause odors and harmful air emissions to invade Plaintiffs' homes and would significantly interfere with the Plaintiffs' right to free use and comfortable enjoyment of their properties.

41. CO-ALLIANCE and the Himsel Defendants acting individually and/or as agents, servants and/or employees of 4/9 entered into the Contract which requires the performance of activities and operations at the CAFO property that CO-ALLIANCE and/or the Himsel Defendants knew or should have known would create a nuisance as defined by Ind. Code § 32-30-6-6 and/or would likely cause injury to others.

42. The Defendants are aware of the nuisance conditions created by their past and continuing animal confinement and waste collection and disposal activities yet they have allowed those activities to continue in blatant disregard for Plaintiffs' health, safety, well-being, property values, and ability to use and live comfortably in their homes.

43. The Defendants' unreasonable conduct constitutes "the negligent operation of an agricultural operation and its appurtenances" as defined by Indiana's Right to Farm Act, Ind. Code § 32-30-6-9 ("RTFA"), thereby removing the Defendants' animal confinement and waste collection and disposal activities at the CAFO from the RTFA's protection.

44. As a direct and proximate result of the nuisance created by the Defendants' unreasonable conduct, the Plaintiffs have been injured, their property rights invaded, and they have sustained personal, property and other pecuniary damages, and will in the future continue to suffer injury to their property and persons if Defendants' nuisance activities are not abated.

45. By reason of the foregoing, Plaintiffs respectfully request judgment against the Defendants for relief as set forth in paragraph 103.

COUNT II - NEGLIGENCE

46. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 37 above as though fully set forth in this Count II.

47. At all times relevant herein, the Defendants had and have a duty to site, design, construct, maintain, manage, operate, direct and/or control the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property in a reasonable manner and condition so as not to substantially injure the interests of neighboring landowners, including the Plaintiffs.

48. At all times relevant herein, the Defendants had and have a duty to exercise ordinary care in the siting, design, construction, maintenance, management, operation, direction and control of the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property so as not to cause injury or harm to the personal and/or property interests of others including the Plaintiffs.

49. At all times relevant herein, the Defendant CO-ALLIANCE had and has a non-delegable duty to ensure that activities it contracts with others to perform on its behalf will not create a nuisance as defined by Ind. Code § 32-30-6-6 and/or likely cause injury to others, including the Plaintiffs.

50. At all times relevant herein, the Defendants had and have a duty to comply with the emergency release notification requirements of EPCRA.

51. Notwithstanding the aforesaid duties, the Defendants committed the following acts and/or omissions:

- a. decided to locate and construct the CAFO in a location that the Defendants knew or should have known would cause or allow noxious odors and air emissions from the CAFO to invade Plaintiffs' properties, diminish Plaintiffs' quality of life, and interfere with Plaintiffs' property rights;
- b. repeatedly and continually engaged and continue to engage in animal confinement, waste collection and disposal activities at the CAFO that the Defendants know or should know is causing noxious odors and air emissions to invade Plaintiffs' properties, diminish Plaintiffs' quality of life, and interfere with Plaintiffs' property rights;
- c. failed to site, design, construct, maintain, manage, operate, direct and/or control the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property in a reasonable manner, location and condition so as not to substantially injure the interests of adjoining land owners including the Plaintiffs;
- d. failed to exercise ordinary care in the siting, design, construction, maintenance, operation, direction and/or control of the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property so as not to cause injury or harm to the personal and/or property interests of others, including the Plaintiffs;
- e. CO-ALLIANCE contracted with the Himsel Defendants acting individually and/or as agents, servants or employees of 4/9 for the performance of activities at the CAFO property on CO-ALLIANCE'S behalf that CO-ALLIANCE knew or should have known would create a nuisance as defined by Ind. Code § 32-30-6-6 and/or likely cause injury to others, including the Plaintiffs;
- f. repeatedly and continually failed to report the CAFO's releases of ammonia in excess of 100 pounds per day to the state emergency planning commission and local emergency planning committee as required by EPCRA. 42 U.S.C. §§ 11004(b)(1)-(2) and 40 C.F.R. § 355.40.

52. As a direct and proximate result of the Defendants' negligent acts and/or omissions, the Plaintiffs have been injured, their property rights invaded, and they have sustained personal, property and other pecuniary damages, and will in the future continue to suffer injury to their property, property rights and persons.

53. By reason of the foregoing, Plaintiffs respectfully request judgment against the Defendants for relief as set forth in paragraph 104.

COUNT III - TRESPASS

54. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 37 above as though fully set forth in this Count III.

55. From October 6, 2013 to the present date, the Defendants negligently and/or knowingly and intentionally caused or allowed animal waste, air pollutants, harmful gases, and noxious odors to regularly enter and invade properties owned and/or possessed by Plaintiffs thereby causing a continuing trespass on property owned and/or possessed by Plaintiffs.

56. As a direct and proximate result of the Defendants' continued trespass on Plaintiffs' properties, Plaintiffs have been injured, their property rights invaded, and they have sustained personal, property and other pecuniary damages, and will in the future continue to suffer injury to their property, property rights, and persons if Defendants' trespassing activities are not abated.

57. By reason of the foregoing, Plaintiffs respectfully request judgment against Defendants for relief as set forth in paragraph 105.

COUNT IV - DECLARATORY JUDGMENT

Indiana Code § 15-11-2-6(a) is Unconstitutional on its Face and as Applied to Plaintiffs

58. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 57 above as though fully set forth in this Count IV.

59. Indiana Code § 15-11-2-6(a) provides in relevant part that, "[t]he Indiana Code shall be construed to protect the rights of farmers to choose among all generally accepted farming and livestock production practices, including the use of ever changing technology."

60. This law creates a legally protected, special "right" for the agriculture/livestock industry to engage in its preferred industry practices and technologies without government interference and without regard to the harm those practices may cause.

61. Under this law, all branches of State government, including the judiciary, any person with authority under the Indiana Code, and/or any person acting in an official government capacity on behalf of the State of Indiana with authority to interpret, enforce, apply and/or carry out the provisions of the Indiana Code, must do so in a way that "protects" the agricultural/livestock industry's use of its preferred practices and technologies.

62. Although all for-profit industries and businesses have financial and other proprietary interests in being able to use their preferred practices and technologies that maximize profits without regulatory interference, no other industry or business sector besides the agriculture/livestock industry enjoys a special right to engage in those practices or heightened legal protection to do so.

Equal Privileges & Immunities:

63. Article I, Section 23 of the Indiana Constitution prohibits the General Assembly from "grant[ing] to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Code § 15-11-2-6(a) violates Section 23 because there is no inherent difference between the agriculture/livestock industry and all other industries, businesses and economic sectors that is rationally related to disparate treatment they receive under the challenged law.

64. Plaintiffs are uniquely burdened and have standing to challenge the constitutionality of Indiana Code § 15-11-2-6(a) under Art. I., Sec. 23, because the Defendants' use of a CAFO to confine 8,000 hogs and collect and dispose of millions of gallons of hog waste in close proximity to Plaintiffs' homes are "generally accepted livestock production practices" now afforded special legal protection under the challenged law regardless of the harm those practices are causing Plaintiffs.

Open Courts:

65. Article I, Section 12 of the Indiana Constitution provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily, and without delay."

66. To the extent Ind. Code § 15-11-2-6(a) requires Indiana Courts to interpret and apply all state statutes to favor and protect the rights of agriculture/livestock industry parties over the rights of other parties, the law runs afoul of Art. I, Sec. 12 because the challenged law interferes with judicial discretion, the judicial duty of impartiality in deciding cases and determining the rights of parties before the courts, and the substantive and procedural due process rights of parties not engaged in agriculture/livestock production and not protected by the challenged law.

67. Plaintiffs' Art. I, Sec. 12 rights are uniquely burdened by Ind. Code § 15-11-2-6(a) because under the challenged law, the Court must construe Indiana's nuisance statute, the RTFA, the Indiana Rules of Civil Procedure, and all other Indiana Code provisions that apply to Plaintiffs' claims in favor of protecting the Defendants' special "right" to operate the CAFO and engage in the very conduct at issue in this case. Imposing such an inequitable, broad and undefined mandate that requires wholesale interpretation of state law in a biased manner, and against Plaintiffs' legal interests, ensures that the Plaintiffs will not receive fair and impartial consideration of their claims by the Court, as required by Art. I, Sec. 12.

Taking Without Just Compensation:

68. Article I, Section 21 of the Indiana Constitution provides: " No person's particular services shall be demanded, without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first

assessed and tendered." Similarly the Fifth Amendment of the U.S. Constitution provides, in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.

69. When Plaintiffs purchased their properties, they obtained title to those properties along with the traditional bundle of property rights that go along with owning title, including the right of exclusion, the right of use and enjoyment, and the right of disposition. These property rights are protected by Art. I, Sec. 21, and the Fifth and Fourteenth Amendments.

70. When Plaintiffs purchased their properties they had every reasonable investment backed expectation that they would be able to live, eat, sleep, entertain, enjoy their yards and otherwise use, enjoy, control, or sell their homes and properties in a usual and customary manner without unreasonable interference and limits imposed on their rights to do so.

71. The Defendants' past and continuing animal confinement and waste collection and disposal activities at the CAFO have and continue to unreasonably limit and infringe on Plaintiffs' constitutionally protected property rights to reasonably use, enjoy, control, and dispose of their properties.

72. Ind. Code § 15-11-2-6(a) requires the Court to construe Indiana's nuisance statute, the RTFA, the Indiana Rules of Civil Procedure and all other Indiana Code provisions that apply to Plaintiffs' claims to allow the Defendants to engage in animal confinement and waste collection disposal activities at the CAFO which have and continue to substantially limit and infringe on each of Plaintiffs' protected property rights and, therefore, the challenged law constitutes a government taking of Plaintiffs' properties under Art. I, Sec. 21 and the Fifth and Fourteenth Amendments.

73. Although the challenged law as applied to Plaintiffs constitutes a government taking of Plaintiffs' property for public use, the State of Indiana has not provided Plaintiffs with just compensation in violation of Art. I, Sec. 21, the Fifth and Fourteenth Amendments of the U.S. Constitution, and the requirements of Indiana's eminent domain law at Ind. Code § 32-24-1, *et. seq.*

Legislative Interference with Judicial Branch Authority:

74. Article 3, Section 1 of the Indiana Constitution provides in relevant part that "no person, charged with official duties under one of [the separate branches of government] shall exercise any of the functions of another." In turn, Article 7, Section 1 states that, "[t]he judicial power of the State shall be vested in a Supreme Court, in Circuit Courts and such other courts as the General Assembly may establish."

75. By enacting Ind. Code § 15-11-2-6(a), the Indiana General Assembly is attempting to interfere with one of the most fundamental of judicial functions which is to impartially interpret the law and "to say what the law is,"¹⁶ in violation of the separation of powers provisions in Articles 3 and 7.

Notice to the Indiana Attorney General

76. In accordance with Ind. Code § 34-14-1-11, notice is hereby provided to Greg Zoeller in his official capacity as Attorney General for the State of Indiana that Ind. Code § 15-11-2-6(a) is unconstitutional on its face and as applied to Plaintiffs for the reasons stated above.

Indiana Code § 32-30-6-9 is Unconstitutional as Applied to Plaintiffs

77. Indiana Code § 32-30-6-9 commonly referred to as the Indiana Right to Farm Act ("RTFA") provides in relevant part as follows:

¹⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch), 137, 177 (1803); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2776 (2015) (the "exercise of independent judgment is the Court's judicial duty").

An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if . . .

There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include . . . the conversion from one type of agricultural operation to another type of agricultural operation [or] a change in the ownership or size of the agricultural operation.¹⁷

78. The RTFA provides immunity from nuisance suits to both agricultural and industrial operations that have been in operation for at least one year and have not undergone a “significant change.” However, an agricultural operation does not undergo a “significant change” by converting from “one type of agricultural operation to another” or by changing ownership or increasing in size.¹⁸ Conversely, an industrial operation that converts from one type of industrial operation to another, changes ownership or increases in size would be deemed to have undergone a significant change thereby removing RTFA protection for one year after such a change.

79. Plaintiffs purchased, resided and obtained protected interests in their properties long before the CAFO was constructed and did not “come to the nuisance” or cause a “change in conditions in the vicinity” of the CAFO property.

80. Nevertheless, because the Defendants’ conversion of the CAFO property to a CAFO with 8,000 hogs is not considered a “significant change” under the RTFA, Plaintiffs had no one-year period of time to obtain relief for the Defendants’ creation of an otherwise actionable nuisance because the CAFO was deemed to have been in continuous operation for decades before it was even built.

¹⁷ Ind. Code § 32-30-6-9(d).

¹⁸ Ind Code § 32-30-6-9(d)(1).

81. Thus, as applied to Plaintiffs, the RTFA allows the Defendants to substantially impair Plaintiffs' constitutionally protected property interest in the use and enjoyment of their properties without providing Plaintiffs any opportunity to obtain a remedy for that impairment.

Equal Privileges & Immunities:

82. Article I, Section 23 of the Indiana Constitution prohibits the General Assembly from "grant[ing] to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

83. The RTFA violates Section 23 because there is no inherent difference between agricultural operations and industrial operations that is rationally related to the disparate treatment they receive under the RTFA. While providing uninterrupted protection to agricultural operations that change ownership, convert operations, or expand in size, but not to industrial operations, the law is not uniformly applicable and equally available to all similarly situated operations as expressly identified and selected for special treatment in the law itself.

84. Plaintiffs are uniquely burdened by this disparate treatment because they have no opportunity to obtain a remedy for the conversion of the CAFO property to a nuisance-producing CAFO unlike persons whose property interests are similarly impaired when an industrial operation becomes a nuisance after converting or expanding. Therefore, Plaintiffs have standing to challenge the constitutionality of the RTFA as applied to them under Art. I., Sec. 23.

Open Courts:

85. Article I, Section 12 of the Indiana Constitution provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily, and without delay."

86. Under the common law and Indiana's nuisance statute at Ind. Code § 32-30-6-6, all Indiana citizens, including Plaintiffs, have a recognized and existing remedy to bring a cause of action for nuisance to protect their properties from anything that is "injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property" regardless of whether the nuisance is due to negligent conduct.

87. The "significant change" provision of the RTFA serves to bar Plaintiffs' otherwise actionable nuisance claim before the claim ever accrued thereby imposing an impossible condition on the Plaintiffs' access to the courts and pursuit of their recognized tort remedy in violation of Art. I, Sec. 12.

88. Plaintiffs' Art. I, Sec. 12 rights are also burdened by the RTFA because it allows Defendants' to violate Plaintiffs' vested and constitutionally protected right of use and enjoyment of property while foreclosing a remedy for that violation.

Taking Without Just Compensation:

89. Article I, Section 21 of the Indiana Constitution provides: "No person's particular services shall be demanded, without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Similarly the Fifth Amendment of the U.S. Constitution provides, in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.

90. When Plaintiffs purchased their properties, they obtained title to those properties along with the traditional bundle of property rights that go along with owning title, including the

right of exclusion, the right of use and enjoyment, and the right of disposition. These property rights are protected by Art. I, Sec. 21, and the Fifth and Fourteenth Amendments.

91. When Plaintiffs purchased their properties they had every reasonable investment backed expectation that they would be able to live, eat, sleep, entertain, enjoy their yards and otherwise use, enjoy, control, or sell their homes and properties in a usual and customary manner without unreasonable interference and limits imposed on their rights to do so.

92. The Defendants' past and continuing animal confinement and waste collection and disposal activities at the CAFO have and continue to unreasonably limit and infringe on Plaintiffs' constitutionally protected property rights to reasonably use, enjoy, control, and dispose of their properties.

93. The RTFA allows the Defendants to engage in animal confinement and waste collection disposal activities at the CAFO which have and continue to substantially limit and infringe on each of Plaintiffs' protected property rights and, therefore, the challenged law constitutes a government taking of Plaintiffs' properties under Art. I, Sec. 21 and the Fifth and Fourteenth Amendments.

94. Although the RTFA as applied to Plaintiffs constitutes a government taking of Plaintiffs' property for public use, the State of Indiana has not provided Plaintiffs with just compensation in violation of Art. I, Sec. 21 of the Indiana Constitution, the Fifth and Fourteenth Amendments of the U.S. Constitution, and the requirements of Indiana's eminent domain law at Ind. Code § 32-24-1, *et. seq.*

Notice to the Indiana Attorney General

95. In accordance with Ind. Code § 34-14-1-11, notice is hereby provided to Greg Zoeller in his official capacity as Attorney General for the State of Indiana that the RTFA is unconstitutional as applied to Plaintiffs for the reasons stated above.

96. By reason of the foregoing, Plaintiffs respectfully request judgment against Defendants for relief as set forth in paragraph 106.

COUNT V – INVERSE CONDEMNATION

97. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 57 above as though fully set forth in this Count V.

98. Plaintiffs are the “owners” of their real properties as that term is defined by Ind. Code § 32-24-1-2.

99. The RTFA and/or Ind. Code § 15-11-2-6(a) (“Right to Farm laws”) effectively authorized the Defendants to exercise the power of eminent domain to acquire the Plaintiffs’ real property interests including the right of exclusion and the right of use and enjoyment, which are protected by Art. I, Sec. 21, and the Fifth and Fourteenth Amendments. Therefore, the Defendants are “condemnors” as defined by Ind. Code § 32-24-1-1 and subject to the requirements of Ind. Code § 32-24-1, *et. seq.*

100. Although Defendants exercised the power of eminent domain under Indiana’s Right to Farm laws to acquire Plaintiffs’ property interests, the Defendants did not follow condemnation procedures as required by Ind. Code § 32-24-1, *et. seq.*, thereby depriving Plaintiffs of their property interests without due process and just compensation.

101. Accordingly, Plaintiffs are entitled to have their damages assessed in accordance with Ind. Code § 32-24-1-16.

102. By reason of the foregoing, Plaintiffs respectfully request judgment against Defendants for relief as set forth in paragraph 107.

PRAYER FOR RELIEF

103. As to the allegations contained in Court I for nuisance, Plaintiffs respectfully request the following relief:

- a. Compensatory damages against the Defendants, jointly and severally, for all damages incurred by Plaintiffs according to proof;
- b. Injunctive relief ordering the Defendants to take action as necessary to the abate the continuing nuisance on Plaintiffs' properties;
- c. All other relief as the Court deems just and proper.

104. As to the allegations contained in Count II for negligence, Plaintiffs respectfully request the following relief:

- a. Compensatory damages against the Defendants, jointly and severally, for all damages incurred by Plaintiffs according to proof;
- b. All other relief as the Court deems just and proper.

105. As to the allegations contained in Count III for trespass, Plaintiffs respectfully request the following relief:

- a. Compensatory damages against the Defendants, jointly and severally, for all damages incurred by Plaintiffs according to proof;
- b. Injunctive relief ordering the Defendants to take action as necessary to abate the continuing trespass on Plaintiffs' properties;
- c. All other relief as the Court deems just and proper.

106. As to the allegations contained in Count IV for declaratory judgment, Plaintiffs respectfully request the following relief:

- a. Declaratory judgment that Ind. Code § 15-11-2-6(a) is unconstitutional on its face and therefore void and/or unconstitutional as applied to Plaintiffs;

- b. Declaratory judgment that Indiana Code § 32-30-6-9 is unconstitutional as applied to Plaintiffs;
- c. Plaintiffs' costs and reasonable attorneys' fees;
- d. All other relief as the Court deems just and proper.

107. As to the allegations contained in Count V for inverse condemnation, Plaintiffs respectfully request the following relief:

- a. An order requiring the Defendants to follow condemnation procedures set forth in Ind. Code § 32-24-1, *et. seq.* including assessment and payment of Plaintiffs' assessed damages for the interests in Plaintiffs' properties acquired by Defendants;
- b. Plaintiffs' costs and reasonable attorney fees;
- c. All other relief as the Court deems just and proper.

Plaintiffs request a trial by jury on all issues so triable.

DATED: August 5, 2016


Respectfully submitted,



Kim E. Ferraro, Attorney No. 27102-64
Hoosier Environmental Council
407 E. Lincolnway, Suite A
Valparaiso, IN 46383
219/464-0104

CERTIFICATE OF SERVICE

I certify that on the 5th day of August, 2016 service of a true and complete copy of the foregoing pleading was made upon the parties listed below by depositing same in the U.S. Mail in envelopes properly addressed to them and with sufficient first-class postage affixed.



Kim E. Ferraro

Christopher J. Braun
Jonathan P. Emenhiser
Ann O. McCready
Plews Shadley Racher & Braun, LLP
1346 N. Delaware Street
Indianapolis, IN 46202

Kyle A. Lansberry
Brandon W. Ehrie
Laura M. Walker
Lewis Wagner, LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202

Brian L. Park
Office of Indiana Attorney General
Indiana Government Center South, 5th Fl.
302 West Washington Street
Indianapolis, IN 46204-2770